Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

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Leadership is a behavior, not a position

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Commissioner

Department of
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KENTUCKY
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The Leadership Institute Branch of the Department of Criminal Justice Training offers a Web-based service to address questions concerning legal issues in law enforcement. Questions can now be sent via e-mail to the Legal Training Section at

docjt.legal@ky.gov

Questions concerning changes in statutes, current case laws and general legal issues concerning law enforcement agencies and/or their officers acting in official capacity will be addressed by the Legal Training Section.

Questions concerning the Kentucky Law Enforcement Council policies and KLEFPF will be forwarded to the DOCJT General Counsel for consideration.

Questions received will be answered in approximately two or three business days.

Please include in the query your name, rank, agency and a daytime phone number in case the assigned attorney needs clarification on the issues to be addressed.

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NOTE:

General Information concerning the Department of Criminal Justice Training may be found at http://docjt.ky.gov. Agency publications may be found at http://docjt.ky.gov/publications.asp.

In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to docjt.legal@ky.gov. The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

KENTUCKY

PENAL CODE – KRS 507 – RECKLESS HOMICIDE

Lucas v. Com., 2012 WL 2360112 (Ky. App. 2012)

FACTS: M.L., age 6, lived with his mother, Lucas, and her boyfriend, Hayes. In May, 2009, Hayes had been investigated for abusing M.L. On August 24, 2007, M.L. became sick at school but pleaded not to be sent home because Lucas and Hayes were there. However, he was picked up by Lucas, who was aware M.L. was vomiting "black matter." On August 28, Lucas went to work, returning about 11:30 p.m. She found M.L. unresponsive on the bathroom floor and put him in the shower. He did not to go to the hospital so she put him to bed. She left the house. When she returned an hour later, she again found him unresponsive and he was not breathing. He died at the hospital from septic shock, having suffered abdominal trauma, cardiac arrest and cerebral trauma.

Both Lucas and Hayes were indicted for murder and criminal abuse. Lucas was convicted of reckless homicide and criminal abuse.[1] Lucas appealed.

ISSUE: Is a common sense awareness that a person is in extremis necessary for a reckless homicide charge?

HOLDING: Yes

DISCUSSION: Lucas argued that the Commonwealth did not present any evidence that showed that "she knew M.L. was in a state of extremis and dying when she left the house." Hayes admitted that he had struck the boy after Lucas left the house that night, and as such, she argued that caused his death. The Court reviewed the statute and the facts, specifically that she knew that he was vomiting black matter (later established to be blood) She admitted she knew his abdomen was distended and that his breathing was labored before she left, taking with her the only household vehicle and telephone. As such, the Court agreed it was proper for the jury to find that she had sufficient knowledge of the situation to justify the conviction.

Lucas's conviction was affirmed.

PENAL CODE – KRS 508 - ASSAULT

Moran v. Com., 2012 WL 1365860 (Ky. App. 2012)

FACTS: in 2007, Moran and Amy Madden were dating while Madden was still married to Howard Madden. She and Moran married after her divorce. On January 20, 2009, however, Howard picked Amy up from a class. Moran spotted them sitting

[1] Hayes was convicted of Manslaughter 2nd and Criminal Abuse.

together in a parking lot and pulled in next to them. At some point, Moran struck Howard (Madden) with his vehicle and allegedly broke his leg – Moran claimed it was an accident but both Amy and Howard argued it was intentional. Ultimately, Moran was convicted of Assault 4th and appealed.

ISSUE: Can soft tissue damage be a serious physical injury?

HOLDING: Yes

DISCUSSION: The Court reversed the conviction for jury instruction reasons, but elected to also address an important issue. The Court noted that one of the elements of Assault 1st (as Moran was originally charged) is serious physical injury. There was apparently some conflict in the description of the injury, as the Commonwealth called it, in the indictment, only "soft tissue damage." However, Howard did spend 20 days in the hospital, used a walker following that, and had continuing problems with the leg. At one point, amputation was contemplated. As such, the Court argued that claim made the original indictment was immaterial and that Moran was not prejudiced by the discussion as to the nature of the injury.

PENAL CODE – KRS 508 - CRIMINAL ABUSE

Com. v. O'Conner, 372 S.W.3d 855 (Ky. 2012)

FACTS: On August 24, 2007, Wright, a CHFS social worker, visited the O'Conner home in Pulaski County. She could see a 3 year old and 7 month old child through the window, but could not get anyone to come to the door. Deputy Sheriff Wesley responded to her call. Eventually, O'Conner answered the door and stated he'd been asleep.

Wright and Wesley entered and found a "deplorable scene;" the home was dirty, had animal excrement inside, with the kitchen sink full of "dirty dishes caked with moldy food and flies were plentiful." Clothes and trash were throughout and there was no working toilet. In fact, three children were present, his wife was at work and an older child at preschool. The children were all locked in their rooms with windows that were closed or boarded up, with no food or water. One of the children had defecated in their room. The air was stifling and the temperature outside was 104.

O'Conner had previously been found to have locked the children in their rooms, under similar conditions. At that time, he was advised as to options for day care and told to get fans to cool the residence. "He heeded this instruction, but placed the fans in his own bedroom."

O'Conner was indicted on charges of Criminal Abuse, 1st degree. He appealed, arguing that there was sufficient proof of intent. His conviction was reversed and the Government appealed.

ISSUE: Is letting your children live in filth and extreme heat intentional?

HOLDING: Not necessarily (see discussion)

DISCUSSION: The Court deplored "the unspeakable filth, unsanitary living conditions, and misery in which the three children were found." The Court noted that that it was not unreasonable for a jury to "conclude that the abuse of these helpless babes was intentional." The court found that the appellate court did not "properly defer to the jury its proper fact-finding role" and reversed its decision, returning the case to the trial court to reinstate the conviction.

PENAL CODE – KRS 509 - UNLAWFUL IMPRISONMENT

Linville v. Com., 2012 WL 2362489 (Ky. 2012)

FACTS: In December 2009, Linville was accused of restraining his girlfriend in their bedroom in Sardis. He verbally and physically assaulted her, and then raped and sodomized her. He was acquitted of Rape and Sodomy, but convicted of Unlawful Imprisonment, Assault 4th degree and Terroristic Threatening. Linville appealed the Unlawful Imprisonment charge.

ISSUE: Is threatening someone with a pocket knife sufficient to be a threat of serious physical injury?

HOLDING: Yes

DISCUSSION: Linville argued that he did not unlawfully restrain A.J. to the extent that it would have potentially caused her serious physical injury, sufficient to warrant 1st degree (felony) unlawful imprisonment. A.J. alleged that Linville threatened her with a small, pocket knife, held to her throat. The Court agreed that it was appropriate for the jury to find Linville guilty of the more serious offense. Further, the Court agreed that the kidnapping exemption did not apply, as the restraint was not simply incidental to the sexual assault but lasted for several hours.

Linville's convictions were upheld.

Johnson v. Com., 2012 WL 1365805 (Ky. App. 2012)

FACTS: On January 12, 2008, as McKee was trying to pass a van on the Natcher Parkway (Daviess County), the occupant (Johnson) starting throwing items from the vehicle, some of which struck McKee's vehicle. McKee stayed behind him as she called her husband, Trooper McKee (KSP), who was off-duty. Trooper McKee immediately responded and caught up to the two vehicles. He fell in behind Johnson and pursued him for over three minutes. Johnson was not speeding, but did not pull over and continued to throw items out of his vehicle. Troopers Weiss and Whittaker responded to assist; Trooper Whittaker intended to deploy stop sticks to halt the pursuit.

However, as he was getting them from his vehicle, Johnson's van approached and the trooper "dove out of the way and narrowly avoided being hit." Unfortunately, the cruisers were struck, as was Trooper Weiss. Trooper Weiss was seriously injured and missed over a year of work. Johnson finally stopped and ran, but was brought down by Trooper McKee. He was taken to the hospital where two bags of methamphetamine were found in his sock.

Johnson was indicted on numerous charges, including Assault 1st. At trial he argued he was insane due to his diagnosis of bipolar disorder that triggered paranoid delusions. He also argued that the "actions of the trooper caused him to run off the road and lose control of his vehicle.

Johnson was found guilty but mentally ill. He appealed.

ISSUE: Are injuries sustained as a result of a police chase an assault?

HOLDING: Yes

DISCUSSION: Johnson argued that the charges required that he be proven to have intended to cause the collision, and that this burden was not met. Instead, he argued, he "merely lost control of his van and that the accident was exacerbated by the overzealous actions of police." He had offered proof that he was not speeding or driving erratically and that the evidence indicated he was sliding when he hit the cruiser. The Court reviewed the in-car video which suggested Johnson drove into the median, struck the cruisers and then accelerated back onto the road. Further, his deflated tires were actually likely caused by the collision, not the stop sticks.

Further, the court agreed that Assault 1st may be proven by wanton conduct, not necessarily intentional conduct. Although Johnson argued he could not see the troopers, the Court noted it wasn't unreasonable to assume troopers would in or near the parked cruisers. As such, the wanton endangerment charge for the other troopers was also valid. Fleeing and evading was appropriate because he failed to pull over when signaled (by lights and sirens) to do so.

Finally, the court agreed that an instruction on Extreme Emotional Disturbance (EED) was unnecessary because mental illness, standing alone, "does not constitute EED." Instead, EED is established by a showing of some triggering event that causes an "explosion of violence." It must be "sudden and interrupted" and be as a result of "adequate provocation." None of this was shown in Johnson's case; he argued that a call from his girlfriend angered him, but no specifics were proven. A "general contention" that he was paranoid about police was also insufficient.

Johnson's convictions were affirmed.

PENAL CODE – KRS 510 - SEXUAL ABUSE

Conder v. Com., 2012 WL 2053878 (Ky. App. 2012)

FACTS: Conder, along with other members of an Owensboro area church, went on a mission trip to Letcher County. One evening, Conder, age 22, W.M., age 15 and others were watching a movie on a laptop. W.M. testified that Conder began touching her by putting his hand down the back of her pants. W.M. moved away from him, but Conder followed, this time placing his hand down the front of her pants. Conder later testified that he may have touched her but it was not intentional.

Conder was convicted of sexual abuse and appealed.

ISSUE: Is touching of the pubic area, but not the actual genitalia, sufficient for sexual abuse charges?

HOLDING: Yes

DISCUSSION: Conder argued that it was not proven that he touched W.M. in an intimate way, for sexual gratification. The Court that although Conder did not apparently touch her genitalia, he was touching the area near her pubic hair. W.M. testified that he touched her throughout the trip. The Court agreed her testimony to be clear, consistent and corroborated by another witness.

Conder's conviction was affirmed.

PENAL CODE – KRS 520 - ESCAPE

Land v. Com., 366 S.W.3d 9 (Ky. App. 2012)

FACTS: In March, 2010, Land was sentenced to five years for a felony, but received an alternative sentence of restitution and 20 days in jail. He was permitted to serve his sentence on weekends. However, Land failed to report to jail one weekend and was indicted for Escape 2nd. He moved to dismiss, arguing that it was a probation violation, instead, but the trial court disagreed. He took a conditional guilty plea and appealed.

ISSUE: Is failure to return to jail after a work release an escape?

HOLDING: Yes

DISCUSSION: The Court agreed that escape was a departure from custody or a detention facility. In this case, he failed to return to the jail, as required, and further, was a convicted felon. The Court agreed under either argument, it was clearly Escape 2nd, and affirmed his conviction.

PENAL CODE – KRS 524 – TAMPERING WITH PHYSICAL EVIDENCE

Jackson v. Com., 2012 WL 1965373 (Ky. App. 2012)

FACTS: On September 13, 2009, Louisville Metro PD received a call from Hendricks about a shooting that had occurred in front of her home. Officer Hayes responded and found a woman (Dongeray Jackson) on the ground, with Jackson on top of her. She appeared to have been shot and EMS was called. Officer Hayes asked Jackson about the weapon and discovered that it was inside an open car trunk nearby. Jackson tried several times to close the trunk, but Hayes kept Jackson from doing so. Because Jackson was belligerent with the responders, he was removed from the scene. Dongeray died. Jackson was charged with Murder, Tampering with Physical Evidence and related charges. Witnesses testified that Dongeray actually shot herself. Jackson was not convicted of any homicide charges, but was convicted of Tampering for his attempt to hide the weapon. As a convicted felon, he took a plea to weapons-related charges and appealed.

ISSUE: Can trying to hide evidence to protect a third party be considered Tampering with Physical Evidence?

HOLDING: Yes

DISCUSSION: Jackson argued that because he was not convicted of causing Dongeray's death, he could not be convicted of Tampering as he would have had "no motivation to hide anything from the police. He claimed he was trying to hide the weapon to protect his wife, as she was also a convicted felon, but he was not permitted to introduce that as it was "improper character evidence" against a victim. In fact, the Court noted, this was evidence that actually supported the Tampering charge.

Jackson's conviction was affirmed.

PENAL CODE – KRS 524 – INTIMIDATING A PARTICIPANT IN THE LEGAL PROCESS

Patterson v. Com., 2012 WL 1657125 (Ky. App. 2012)

FACTS: In 2009, Patterson was involved in heated post-divorce litigation regarding his child's custody and visitation arrangements. He was prohibited from contact with the child by Judge Spainhour, in Bullitt County. Patterson made various, but vague, threats against the judge. He went to Florida, and there was heard to say that he wanted to "kill all cops" and judges in Kentucky, by a Florida deputy sheriff. Patterson was referred for mental assessment in Florida but did not cooperate. Eventually, he was released and made his way back to Kentucky. Florida referred the case to CHFS in Nelson County. CHFS followed up but did not initially report threats made by Patterson toward police and the judge. However, the social worker "realized the situation was more serious than originally thought" and the matter was referred to Bullitt

County. Patterson appeared at the Bullitt County courthouse to file a motion in the custody case; there he was interviewed by a deputy sheriff. He was charged that day with "retaliating against a participant in a legal process." Judge Spainhour recused herself from the case. Patterson was referred for mental evaluation and eventually indicted for his statements. He was convicted and appealed to the count involving Judge Spainhour.

ISSUE: May a threat made to a third party be sufficient to charge for Intimidating a Participant in the Legal Process?

HOLDING: Yes

DISCUSSION: Patterson argued that his statement was "a reactionary statement uttered in the heat of the moment upon learning upsetting news." He noted that he did not make a direct threat to Judge Spainhour. The Court agreed that it was not necessary to make a threat directly to the victim to qualify under KRS 524.055. Further Patterson's repetition of the threat, multiple times, indicated it was not a "hasty one-time remark made without thought." Although he never named Judge Spainhour, she was the "only judge standing between him and his daughter."

Patterson's conviction was affirmed.

JUVENILE

J.D.N. v. Com., 2012 WL 1447989 (Ky. App. 2012)

FACTS: J.D.N., a juvenile in 2007, was accused of multiple counts of Theft and Criminal Mischief. There was no written restitution order but apparently he were ordered to pay it at a hearing, J.D.N. challenged the restitution amount (over $7,000). Further, he argued that at turning 18, the Juvenile Court lost authority over him.

ISSUE: May Juvenile Court extend jurisdiction over an adult still serving a sentence from being a juvenile?

HOLDING: Yes

DISCUSSION: The Court agreed that the Juvenile Court had the authority to retain jurisdiction over J.D.N. past the age of 18, as well as to set and enforce a restitution order. Further, he had the opportunity to contest the amount in the juvenile proceeding and chose not to do so.

The Court upheld the restitution order.

DOMESTIC VIOLENCE

Isaacs v. Isaacs, 2012 WL 181305 (Ky. App. 2012)

FACTS: Kenneth and Tracy Isaacs were involved in a divorce. On July 27, 2010, Tracy was living at the marital residence alone, when she filed for a DVO against Kenneth. She claimed that Kenneth threatened to kill her dog and harm her and that he had a "long history of being violent." Tracy also claimed he regularly hung around in the neighborhood, sent her threatening emails, rang the doorbell and called her at home. She received the EPO. At the subsequent hearing, Tracy testified as to the above and the DVO was issued. Kenneth appealed its issuance.

ISSUE: Must threats be explicit to be enough for a DVO?

HOLDING: No

DISCUSSION: Kenneth argued that the evidence did not prove he inflicted a fear of imminent physical injury. The Court agreed that the facts, as presented, so proved and upheld the DVO.

DUI

Harris v. Com., 2012 WL 2052100 (Ky. App. 2012)

FACTS: On September 3, 2008, Harris was involved in a minor crash in Louisville. The responding officer reported a strong odor of alcohol and Harris admitted he'd had a beer, along with some sleeping medication, and that "he had been around people who were smoking marijuana." He also claimed to have been distracted by his cell phone. He was given FSTs and was unsteady, and slurred his speech. He agreed to blood, breath and urine tests. His blood alcohol was zero, but he had Xanax in his blood. His urine test, however, indicated Xanax, hydrocodone and the byproducts of marijuana.

Harris was charged with DUI. At trial, Dr. Davis testified that he had reviewed all the evidence and believed Harris to have been intoxicated. Harris filed a motion to limit the admission of the urine test, arguing that the marijuana could have been from up to several weeks before and that the hydrocodone could have been from as much as two days before. Harris contended that it was impossible to conclude he'd been impaired from the urine test and that it was "both irrelevant and unduly prejudicial." The District Court disagreed, as did the Circuit Court. He took a conditional guilty plea and appealed.

ISSUE: Is urine evidence useless in judging impairment?

HOLDING: No

DISCUSSION: The Court looked to the "balancing test" required by KRE 403. Although in Burton v. Com.[2], the Court had "held that in the absence of other evidence reliably supporting a conclusion of impairment, the scientific remoteness of urinalysis only encourages juror speculation," in this case, there was other evidence. Harris's blood alcohol level was "inconsistent with his alleged state of intoxication" and not explained by the single beer he admitted to drinking. In this case, the urine test results were highly relevant.

The Court upheld the plea.

Com. v. Hobbs, 2012 WL 1957297 (Ky. App. 2012)

FACTS: On September 29, 2007, Trooper Drane (KSP) stopped Hobbs for drunk driving, in Meade County. Hobbs was given an Intoxilyzer, which registered .09. He was advised that he could have an independent blood test and asked to have one. Trooper Drane took Hobbs to Hardin Memorial Hospital, unaware that the hospital might refuse to do the test. (Hobbs did not ask for a specific place.) The hospital told Hobbs they wouldn't take the blood test unless there was a physical exam and a medical need, so Hobbs declined. He did not ask for another provider and was taken to jail. Hobbs ultimately argued for suppression of the Intoxilyzer and was refused. He took a conditional guilty plea. The Meade Circuit Court reversed the conviction and the Commonwealth appealed.

ISSUE: If a subject does not agree to a physical exam in order to get a blood test for DUI, is the Intoxilyzer still admissible?

HOLDING: Yes

DISCUSSION: The Court distinguished this from Lee v. Com., which had almost identical facts and involved the same hospital.[3] Here, had Hobbs submitted to the exam, the blood test would have been given to him. The Court agreed that there was no reason for the trooper to know what the hospital would do and there was an "utter lack of evidence" that Hobbs asked for another chance to take the test.

The Court agreed the Intoxilyzer should have been admitted and reversed the Circuit Court's decision.

SEARCH & SEIZURE – SEARCH WARRANT

Harris v. Com., 2012 WL 1758140 (Ky. App. 2012)

FACTS: On October 20, 2009, Det. Curtsinger (Lexington PD) requested a search warrant for Harris's home. He submitted a detailed affidavit connecting Harris to drug trafficking. Cocaine and related trafficking items were discovered. Harris sought

[2] 300 S.W.3d 126 (Ky. 2009).
[3] 313 S.W.3d 555 (Ky. 2010).

suppression of the evidence. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Is it necessary to name a CI in a search warrant affidavit?

HOLDING: No

DISCUSSON: The Court noted that the "affidavit was thorough and detailed and provided ample, specific information – including the detective's own observation." It "clearly demonstrated a pattern of behavior on the part of Harris likely indicative of drug dealing activity." The Court agreed that although the CI is not identified by name, the information provided was sufficient to lead to the "reasonable inference that the CI had actual knowledge of the allegations and was reporting accurately." Det. Curtsinger took steps to corroborate what he could, and controlled buys were made in which apparent cocaine was purchased. The Court agreed, however, that Harris's past convictions for marijuana were sufficiently dissimilar to have little relevance to the case at hand.

The Court found the warrant showed sufficient probable cause and upheld the plea.

Martin v. Com., 2012 WL 1447910 (Ky. App. 2012)

FACTS: On December 9, 2009, Deputy Wilson (Hart County SO) requested a warrant to search Martin's home. Wilson listed his evidence that Martin was manufacturing methamphetamine. A number of items were found and Martin was charged. He moved for suppression and was denied. Martin took a conditional plea and appealed.

ISSUE: Is a person's criminal history valid in a search warrant affidavit?

HOLDING: Yes

DISCUSSION: The Court reviewed the sufficiency of the search warrant and agreed that it was valid. Further, the Court noted that a recitation of Martin's criminal record in the affidavit was proper, although it may not be admissible at trial, as it showed he'd been charged previously with controlled substance offenses.

In an unusual twist, the Court published a dissent worth noting. The Court noted that the callers discussed in the warrants were not identified and as such, there was no way to judge their veracity or the basis of their knowledge. Further, their reports "consist[ed] entirely of a single vague, conclusory allegation." There was nothing the officers could verify prior to seeking the warrants. The Court found the reliability of their statements to be "gravely in question." The warrant referenced 2-liters containing "clear liquid" which the dissent found to be vague, noting that it could be water or vinegar, "or any number of other substances.' The dissent noted that the small quantity of other suspect items (Claritin-D boxes and batteries) in a burn barrel is not enough either. Further, the Court

noted that although he'd been charged, there was no evidence of a conviction of any drug crimes.

The Court upheld the plea

Rogers v. Com., 366 S.W.3d 446 (Ky. 2012)

FACTS: In September, 2009, a CI told Bardstown PD and the Hardin County Task Force that he would be willing to make a buy from Rogers. He received cocaine in exchange for money from Rogers during two buys. Right before the second buy, the detective had gotten a search warrant for Rogers' house and garage. When the buy was confirmed, the officers executed the warrant, finding the marked money from both buys. They also found cocaine, scales and baggies. Rogers moved for suppression of the warrant. "Timing quickly became an issue." The warrant indicated it was signed at 4:50 p.m., which was also apparently the same time that the search itself allegedly began. The detective, however, stated he received the warrant before meeting with the CI for the second buy. The trial judge, who also apparently signed the warrant, suggested that the warrant had to have been signed prior to 4:30, before the courthouse was locked for the day. In fact, the record indicated the judge was involved in another matter at the time the judge supposedly signed the warrant. Further, the Court signed a "presumptive" warrant, which would not have been the case if the buy had already occurred.[4] The motion was denied.

Rogers was indicted for Trafficking and moved for suppression.

Rogers was convicted and appealed.

ISSUE: Does a clerical mistake invalidate a warrant?

HOLDING: No (as a general rule)

DISCUSSION The Court noted that it was appropriate for the judge to use his own knowledge, combined with verifying the recollection by referring to the court record of the day in question. The mistake was clerical and the RCr 10.10 permits such errors to be corrected.

The Court held the warrant and the search were valid. Rogers' conviction was affirmed.

[4] Presumably the Court meant an anticipatory warrant.

SEARCH & SEIZURE - CONSENT

Combs (Richard and Betty) v. Com., 2012 WL 1254775 (Ky. App. 2012)

FACTS: On March 2, 2010 Captain Allen (Hazard PD) questioned H.M. about a theft, to which he confessed. He claimed to need to money to pay a drug debt owed to Richard Combs and that he feared Richard would hurt him if he did not pay.

H.M. took the officer to the Combs' trailer and they set up surveillance. People came and left within minutes. Suspecting drug activity, Captain Allen did a knock and talk and obtained consent to search. Det. Grigsby found an Oxycontin tablet. The officer stopped the search, secured the residence and got a search warrant. They found methadone, hydrocodone and over $2,000 in cash. They moved for suppression, arguing that the officers anticipated that they would find contraband, and were denied. Both were indicted for trafficking, and convicted.

ISSUE: Is a consent gained during a knock-and-talk valid?

HOLDING: Yes

DISCUSSION: The Court noted that "officers may seek consent-based encounters if they are lawfully present in the place where the consensual encounter occurs."[5] The Court supported knock and talks, as well.[6] As the Court agreed that the officers received valid consent, the Court supported the search.

The convictions were affirmed.

SEARCH & SEIZURE – HOT PURSUIT

Allen v. Com., 2012 WL 1556298 (Ky. App. 2012)

FACTS: On July 17, 2009, at about 3 a.m., Officer Williams (Lexington PD) noticed that a vehicle turned into a cluster of businesses, none of which were open, and drove behind one of the businesses. He turned on his overhead lights. The vehicle did a U-term and Allen, the passenger, jumped out and fled. Officer Williams chased after him and caught Allen when he slipped and fell. (Allen claimed he was tackled, Williams stated Allen slipped and fell on his own.) The two struggled and Allen was secured. At some point, apparently, Officer Bowles, who responded as backup, gave Allen his Miranda warnings.

Officer Williams asked Allen why he ran; he stated there was an outstanding warrant against him. That was confirmed and Allen was arrested. Over $1,000 in cash was found during the search. When asked if anything was missed, he stated "it fell down my

[5] Kentucky v. King, 131 S.Ct. 1849 (2011).
[6] Quintana v. Com., 276 S.W.3d 753 (Ky. 2008).

leg." Drugs were found nearby. Sgt. Lowe readvised Allen of his rights. Allen was taken to the hospital and questioned again, less than an hour later, and he admitted that the drugs found were his.

Allen was charged and requested suppression. The Court agreed that it appreciated the officer's investigation of suspicious activity, "but noted that he could have done so without initiating the stop." The Court found no reasonable suspicion for the stop.

However, the Court noted that "other jurisdictions have held that the discovery of an outstanding warrant overcomes any taint of an impermissible initial encounter." Further, Allen's flight gave them an independent reason to stop him. The Court concluded that the evidence did not need to be suppressed. The Court commended the officer's truthfulness when he admitted that he wasn't sure that Allen received his Miranda warnings. The Court sustained the suppression of the initial statements. After he was given Miranda[7], and answered questions, however, the Court agreed it was admissible, and it also admitted the statements made at the hospital.

Allen took a conditional guilty plea and appealed.

ISSUE: Does unprovoked flight, in itself, satisfy reasonable suspicion?

HOLDING: Yes

DISCUSSION: Allen continued to argue that if Williams lacked reasonable suspicion for the initial stop, "all evidence flowing from the stop must be suppressed." Further, he argued that his flight was not enough to justify the officer chasing and stopping him. The Court looked to Illinois v. Wardlow and agreed that such flight was the "consummate act of evasion." He "jumped out of a moving vehicle and ran" and was not seized until he was engaged with Officer Williams.

With respect to his initial statement, about something falling down his leg, the Court noted that while his statement could be excluded, "evidence obtained as a result of such a statement" is not subject to exclusion.[8] The Court agreed the later statement, after Miranda, was admissible.

The Court affirmed the conditional guilty plea.

SEARCH & SEIZURE – VEHICLE – GANT

Johnson v. Com., 2012 WL 1573517 (Ky. App. 2012)

FACTS: On March 13, 2009, Shively PD set up a sting operation involving a prostitute, Gortney. Det. Spaulding and Gortney agreed on a price, and when she accepted, she was arrested. A small amount of cocaine was found during the

[7] 384 U.S. 436 (1966). For the sake of brevity, Miranda will not be cited from this point forward.
[8] U.S. v. Patane, 542 U.S. 630 (2004).

subsequent search. She agreed to become an informant and a buy was arranged with Johnson.

Upon Gortney getting out of the car with Johnson, officers converged on her. They found her in possession of cocaine and Johnson in possession of the marked money she had gotten from police. They also found, in Johnson's car, 200 hydrocodone and 97 alprazolam. He was charged with Trafficking, Promoting Prostitution and PFO. At trial, he moved to suppress the evidence under Arizona v. Gant[9] because he was outside the vehicle when it was searched. The trial court denied the motion, finding he was searched for evidence of the arrest (drugs). At trial, Johnson argued that since no cocaine was found on his person or the car, and he was legally entitled to have the pills, the prosecution failed to prove Trafficking. The Commonwealth argued that the pills weren't in properly marked bottles and were prescribed in quantities far less than the number actually found. It argued that trafficking could be inferred from the number of pills and their location. Johnson testified that he had purchased the pills with a prescription and had accumulated them because he took them only as needed. He claimed all his possessions were in his truck as he was living out of it, and that Gortney had given him the money in repayment of a loan.

Johnson was, however, convicted and appealed.

ISSUE: Does a drug arrest permit searching a vehicle for drugs under Gant?

HOLDING: Yes

DISCUSSION: Johnson continued to argue that under Gant, the search was unlawful. However, the Court noted, "since Gant, Kentucky courts have consistently held that arrests for drug offenses provide a basis for searching the passenger compartment of an arrestee's vehicle for evidence relating to that offense." The Court agreed they had a reasonable basis to search the vehicle. Further, the Court agreed that his possession of the medications, particularly those in unmarked bottles, in quantities far in excess of the normal prescription was questionable. Further, he was filling prescriptions while unemployed and with his own money, rather than insurance, and accumulating those pills. That evidence was sufficient to support the position of the Commonwealth.

The Court upheld the conviction.

[9] 129 U.S. 1710 (2009).

SEARCH & SEIZURE – TRAFFIC CHECKPOINT

Singleton v. Com., 364 S.W.3d 97 (Ky. 2012)

FACTS: The City of Liberty requires that persons who live or work in the city obtain a vehicle sticker. Having gotten complaints that certain persons had not done so, the PD set up a traffic checkpoint. Each vehicle was stopped and if it bore a sticker, it was waved through. If not, the driver was questioned and if they lived or worked in the city, they received a warning.

Singleton approached the checkpoint and was stopped. He rolled down the window. Although the officers confirmed he was not in violation of the ordinance, they smelled marijuana coming from the vehicle. Singleton admitted he'd just smoked it and was removed from the vehicle for a sobriety check. The officers searched the vehicle, finding marijuana, scales and plastic bags. Singleton was charged with DUI, trafficking in marijuana and related charges.

Singleton moved for suppression. The Court looked to Indianapolis v Edmond[10] and Com. v. Buchanan[11] and concluded that "stopping a motorist at a traffic checkpoint without any individualized suspicion of wrongdoing was improper." However, the Kentucky Court of Appeals reversed the trial court finding that the checkpoint was proper. Singleton further appealed.

ISSUE: Is checking for a violation of a non traffic related ordinance sufficient to warrant a checkpoint?

HOLDING: No

DISCUSSION: The Court noted that a "traffic checkpoint inherently generates tension between an individual's legitimate privacy interests … and the state's responsibility for law enforcement and public safety concerns." The Court noted that it was necessary to look to the "primary purpose of the checkpoint" to decide its validity. In this case, it was to enforce a violation of a city ordinance and there were alternative, and far less intrusive, ways to achieve the same objective. The Court disagreed with the Commonwealth's argument that the matter was similar to Delaware v. Prouse, which permitted stops to check vehicle registrations and driver's licenses, because those directly relate to traffic safety.[12] The sticker ordinance, however, had no connection to traffic safety at all.

The Court agreed that the checkpoint was improper, reversed the Court of Appeals and returned the case to Casey County.

[10] 531 U.S. 32 (2000).
[11] 122 S.W.3d 565 (Ky. 2003).
[12] 440 U.S. 648 (1979).

INTERROGATION – CONFESSION

Stidham v. Com., 2012 WL 1556249 (Ky. App. 2012)

FACTS: On October 20, 2008, Stidham approached McClure and offered to sell him some meat from a refrigerated truck. McClure agreed and wrote a check for $126. When the check came back, however, it was discovered that it had been cashed for $426 and was apparently altered. A report was made and Lexington PD investigated, speaking to Stidham's employer and then Stidham. Stidham eventually confessed and was arrested.

Stidham was charged with Criminal Possession of a Forged Instrument and PFO. He moved for suppression, arguing he did not receive Miranda warnings. The trial court ruled that the confession was proper. He was convicted at trial and appealed.

ISSUE: Are threats of jail time coercive?

HOLDING: No

DISCUSSION: Stidham continued to argue that the confession was "the product of coercion and deception" because the detective threatened him with jail time if he did not confess. He also claimed there were "false statements of leniency." The Court looked to the surrounding circumstances and noted that in fact, he was given his Miranda rights. Further, he actually offered the detective a bribe, as well. The Court agreed that the detective's conduct "did not overbear Stidham's will" and cause him to confess. The Court agreed, as well, that it was proper to refuse to allow him to play the tape because the Commonwealth also agreed not to play the tape.[13]

Stidham's conviction was affirmed.

INTERROGATION – RIGHT TO COUNSEL

Tooley v. Com., 2012 WL 1137845 (Ky. App. 2012)

FACTS: On January 4, 2006, Tooley was arrested in Louisville, for Vitt's death. Det. Halbleib (Louisville Metro PD) gave Tooley his Miranda rights and he waived those rights, in writing. For about 2 hours, Dets. Halbleib and Cohn "attempted to build rapport" with him, working up to asking him about the homicide. When they did so, Tooley asked "Do I get to call my attorney?" He was reminded that he had been given his rights and he "quickly confirmed multiple times that he wanted to speak to his attorney." The interrogation ended.

[13] Had the Commonwealth wanted to play a portion of the tape, Stidham would have been justified in insisting on playing the entire tape, under the "rule of completeness" – KRE 106.

In a few minutes, Det. Halbleib gave Tooley a phone book to look up his attorney's number. While he was doing so, Det. Cohn began to question him about a handgun, told him that they had an "open and shut case." Tooley reiterated he wanted to speak to his attorney. Cohn continued questioning him for 25 minutes, until he was told to stop by another officer.

During the break, Tooley was arrested. He asked to return to the interrogation room, "declaring he wanted to tell them what happened." Halbleib reminded him that because he'd asked for an attorney, he could not talk to Tooley. Tooley said he no longer wanted one and the second interview began. Halbleib reviewed the Miranda rights and confirmed that Tooley wanted to speak to them. Tooley confessed.

Tooley was indicted. He moved for suppression, arguing that it was improper to speak to him after he'd invoked right to counsel. The trial court suppressed the first interview, but not the second, finding that in the first, they'd continued interrogation after he'd invoked. Tooley was convicted of Manslaughter and appealed.

ISSUE: May a statement be suppressed if officers violate a suspect's right to counsel?

HOLDING: Yes

DISCUSSION: In Minnick v. Mississippi, the Court clarified that Edwards[14] "does not prohibit a suspect from engaging in subsequent discussion with the police if the suspect himself, rather than the police, "initiates further communication, exchanges or conversations with the police."[15] That does not occur, however, when the suspect responds simply to "further police-initiated custodial interrogation."[16]

If that does, in fact, occur, the Court must apply the two-part test developed by Oregon v. Bradshaw[17] and Smith v. Illinois.[18] First, the Court must determined if the subject actually invoked, and if so, whether they initiated further discussion and "knowingly and intelligently" waived a right he'd previously invoked. The Court agreed that the second confession was properly admitted.

The Court strongly criticized the issue surrounding the first interview, describing Det. Cohn's actions as "badgering" – "in the precise manner forbidden by Edwards, and constituting a serious violation of Tooley's Miranda rights." Had he confessed then, his confession would have been inadmissible. The Court, however, declined to make it a rule that "an Edwards violation by an interrogating police officer cannot be superseded and rendered harmless by the accused's subsequent voluntary conduct." There was no indication that the detectives intended to "employ an intentional two-step

[14] Edwards, supra.
[15] 498 U.S. 146 (1990).
[16] Arizona v. Roberson, 486 U.S. 675 (1988) United States v. Whaley, 13 F.3d 963 (6th Cir. 1994).
[17] 462 U.S. 1039 (1983).
[18] 469 U.S. 91 (1984).

interrogation strategy." Instead, it appeared that his decision to talk stemmed from his realization that he was going to jail that night. As such, the Court upheld the admission of the second interrogation.

INTERROGATION – RIGHT TO SILENCE

Buster v. Com., 364 S.W.3d 157 (Ky. 2012)

FACTS: Kenny Buster was accused of sexual abuse and rape of multiple children, in Hart County, who began to come forward in 2009. His wife, Patricia, was accused of witnessing and participating in the abuse. Patricia Buster is mentally handicapped with a "significantly substandard intelligence." When she was arrested, and given Miranda rights, she told Munfordville Chief Atwell she had nothing to say to him.

Bell, a CHFS social worker, learned of the arrest and headed to the station. Bell was already investigating related allegations and had interviewed Buster at least twice. She had given Bell a list of victims, which he had in turn given to the police. When asked, she agreed that she would talk to Bell and he spoke privately to her for about thirty minutes, whereupon she agreed to give Atwell a statement. She signed a waiver of rights and handwrote a lengthy confession, naming victims and acts of sexual abuse.

Buster was charged with multiple counts of sexual abuse, complicity, rape and related charges. She moved for suppression, arguing she did not "intelligently and knowingly waive her rights and that her confession was not voluntarily made." When that was denied, she took a conditional guilty plea and appealed.

ISSUE: May a statement be suppressed if officers violate a suspect's right to silence?

HOLDING: Yes

DISCUSSION: Buster argued that the "police failed to respect her invocation of her right to silence" by asking her if she wanted to speak to Bell. However, the Court had previously not "read Miranda as establishing a bright-line rule that police may never return to questioning a suspect who has invoked his right to silence."[19] The Court noted, however, that simply because Bell was not a police officer "does not mean that his actions could not violate [Buster's] rights." He was working as an investigator and he was turning over all the information he had to the police. He was a government actor. Although no explanation was given as to the purpose in having Bell talk to Buster, "it is difficult to imagine what purpose they could have had other than convincing [Buster] to talk to the police."

> The court was "skeptical that Bell, who was actively investigating Appellant and who admitted he wanted her to make a statement because it would help his

[19] Michigan v. Mosley, 423 U.S. 96 (1975).

investigation, could truly act as a neutral "supporter" as he talked with Appellant while she was in custody at a police station. More importantly, the decision that Bell was supposedly supporting her in making—whether or not she should make a statement to him or to Atwell—had already been made. Appellant had already unequivocally asserted her right to silence, and there was no need for further discussion."

The court agreed that by "By ignoring her invocation of her right almost immediately and by talking with her at length about a decision she had already made, Atwell and Bell "persist[ed] in repeated efforts to wear down [her] resistance and make [her] change her mind." As such, they did not "scrupulously honor" her right to stop questioning. Finally, only moments passed between her statements that she would not talk, and being asked if she would talk to Bell. Although Bell called it a conversation, the Court agreed that it was, in fact, an interrogation. It took place at the same police station, and likely, in the same room.

The Court vacated her conviction.

INTERROGATION – MIRANDA – CUSTODY

Butler v. Com., 367 S.W.3d 609 (Ky. App. 2012)

FACTS; On December 10, 2008, Dets. Hankinson and Szydloski (Louisville Metro PD) observed a vehicle pull in and the occupants enter an apartment they were watching, and quickly return to the car. They left. The detectives made a traffic stop based on an unsignaled turn and observation that the driver was unbelted.

Det. Hankinson observed Jones, the back seat passenger put something in his pocket. He had Jones get out and Jones agreed he had crack cocaine and handed over 20 individually wrapped rocks. Hankinson turned to Butler, who also admitted he had crack cocaine. He turned over 31 individually wrapped packages. Butler was cited and released, but subsequently indicted. Butler moved for suppression, alleging he was subjected to a custodial interrogation without having been warned. The motion was denied. He also objected to characterizing the area as high-crime, but the Court stated it would rule on that issue at trial. At trial, Det. Szydlowski "began to testify that the area" … "was known to be a high narcotics area." Butler objected and the jury was admonished.

Butler was convicted and appealed.

ISSUE: Is it permissible to question a passenger during the course of a traffic stop?

HOLDING: Yes

DISCUSSION: Butler argued that the stop evolved into a custodial interrogation and in fact, Det. Hankinson agreed that Butler was not free to leave the scene. However, it was permissible for the detective to order the occupants from the car and Butler let himself out upon request. At the time, Det. Szydlowski "was still speaking to the driver." Det. Hankinson had also observed Jones hiding something and was concerned about it. Even after the drugs were found, Butler was not arrested, but only cited. The Court found the detention was not sufficiently custodial as to trigger Miranda.

The Court also agreed that an admonition was sufficient unless there is some reason to prove it is not, and there was no indication that was not the case. Butler's conviction was affirmed.

SUSPECT IDENTIFICATION

Malone v. Com., 364 S.W.3d 121 (Ky. 2012)

FACTS: Stewart was killed in Louisville, on November 22, 2008. He died at Murphy's home, in a makeshift recording studio. On the night in question, Malone was working in the studio. Stewart apparently criticized Malone's music and Malone left, returning moments later. Within seconds, "Malone pulled out a gun and shot Stewart several times." Malone fled and Stewart died from his injuries.

Initially Murphy and Hudson (another witness) were interviewed. Hudson told the detectives he did not know the shooter, but gave a tentative ID from a photopak. He did, in fact, know him, but did not want to identify Malone initially. He later explaining that he wanted Malone to be "subjected to 'street justice'" rather than arrested. Murphy originally misidentified Malone as well, but corrected himself and picked out a photo of Malone, claiming he did not want to be involved.

Malone was charged and stood trial. Malone's defense consisted of trying to discredit Hudson and Murphy. Malone introduced testimony of another individual, McDonald, who had been in the house, but the testimony given at trial was considerably differently than what he told the detectives initially. McDonald later claimed he had "fabricated much of it because Murphy had asked him to do so." Malone was convicted and appealed.

ISSUE: May pretrial descriptions affect the credibility of a photopack?

HOLDING: Yes (but see discussion)

DISCUSSION: Malone argued that the identification evidence was improperly admitted. He claimed that the "pretrial descriptions of him were so inconsistent and their photo pack identification of him so uncertain," that they were fatally flawed. The Court agreed that the descriptions varied somewhat. However, the Court noted that there was no challenge to the actual photopack identifications, which were "in no way

suggestive of Malone." And of course, Murphy and McDonald both actually knew Malone and therefore were unlikely to have mistakenly identified him.

Malone's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – PRIOR CONSISTENT STATEMENTS

Bailey v. Com., 2012 WL 1821133 (Ky. App. 2012)

FACTS: On December 20, 2009, Bailey and Wright were housed together in jail, in Boyd County. The next morning, they found a broken light fixture, with glass removed, in the cell. Wright said that Bailey did it, but both were charged. Wright made an agreement to testify against Bailey and did so, in a manner consistent with his previous statement. Bailey later objected to Wright being permitted to "read his prior written statement" to the jury. Bailey was convicted and appealed.

ISSUE: Is it proper to repeat a prior consistent statement?

HOLDING: No

DISCUSSION: Bailey argued it was improper to "bolster Wright's testimony" by allowing him to repeat a prior consistent statement, as he did not "attack Wright's trial testimony by stating that it was the product of a recent fabrication or the result of improper influence." The Court agreed that it was improper "unless there is an express or implied charge against the witness of a recent fabrication or improper influence."[20] The Court agreed, however, that Bailey's attempt to impeach Wright by suggesting he made the statement as part of a deal would have made the statement admissible at that point.

The Court upheld Bailey's conviction.

TRIAL PROCEDURE / EVIDENCE – BOLSTERING

Malone v. Com., 364 S.W.3d 121 (Ky. App. 2012)

FACTS: In the summer of 2008, Hayes, a convicted felon, began to assist law enforcement in Graves County. He set up a drug buy from "Gantsta," later identified as Malone. Det. Jessup observed and recorded the transaction and was given the cocaine purchased. Both Hayes and Jessup identified Malone as the seller and ultimately, Malone was convicted. He appealed, arguing that testimony from some witnesses improperly vouched for the credibility of other witnesses.

ISSUE: Is it proper to bolster another witness's testimony?

[20] Dickerson v. Com., 174 S.W.3d 451 (Ky. 2005).

HOLDING: No

DISCUSSION: Malone argued that the testimony of Hayes was improperly bolstered by the testimony of two witnesses and the prosecutor. The Court agreed that while it is appropriate, even necessary, to vouch for the reliability of a CI in a search warrant affidavit, it is generally inadmissible in testimony as character evidence.[21] Such evidence is only appropriate when the witness's credibility has been challenged, or even if it is later impeached. Because Malone did, in fact, do that, the bolstering was harmless.

Further, evidence that Hayes signed a letter claiming Malone did not buy the drugs was properly presented to the jury, and explained. Finally, the Court agreed that Jessup's mention that he identified Malone from a jail photo was improper, but did not fatally taint the case.

Malone's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – VIDEO

Trainer v. Com., 2012 WL 1899778 (Ky. 2012)

FACTS: Trainer was involved in a house fire caused by Trainer cooking methamphetamine. Laster, who was seriously burned in the fire, claimed that she, along with Trainer and Graham, were cooking methamphetamine at the time, but Trainer denied this, claiming he wasn't home at the time. At trial, they testified to conflicting accounts, and Laster was challenged as to her reason for testifying.

Officer Lindsey (unidentified Muhlenberg County agency) investigated. During the fire response, evidence suggesting manufacturing was found, including jars, Drano and related items. As Trainer claimed to have been at a local video rental store at the time of the fire, the officer obtained a copy of the store's security video. Over objection, he was permitted to testify that he did not see Trainer on the recording during the relevant time frame.

Trainer was convicted and appealed.

ISSUE: May a witness narrate a video?

HOLDING: No

DISCUSSION: Trainer argued that it was improper for Lindsey to be allowed to testify as to what the video showed. (Although the tape was introduced into evidence, it was not shown to the jury until after Lindsey testified.) The officer had admitted, under

[21] KRE 404(a).

questioning, that the quality of the tape was poor at that it was possible that Trainer had been in the store. Trainer argued that the tape, itself, was the best evidence and that even if shown, having already heard Lindsey's belief as to what it showed, the jury likely substituted his beliefs for their own. The Court agreed that Lindsey had no personal knowledge of what occurred on the tape and it was improper to allow Lindsey to testify to it. However, it found that the error did not unduly prejudice Trainer as Lindsey agreed on cross-examination that it was possible Trainer was at the store.

Trainer also objected to the testimony of the fire investigators regarding the possible contents (white sludge) found in mason jars at the home. The investigators were trained in such investigations and their belief that the sludge was methamphetamine residence was "based on experience and training."[22] The sludge itself was not tested. Further, Trainer argued that the testimony by two arson investigators that the home was in a high-crime area was improper, but again the Court found it not prejudicial.

Trainer's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – DISCOVERY

Butler v. Com. 2012 WL 1383197 (Ky. App. 2012)

FACTS: Smith worked with Ashland police, in 2009, as a CI. She made a hydrocodone buy and a cocaine buy from Butler, on separate occasions. Butler's case was presented to the grand jury, which took no evidence but indicted him anyway. Butler argued at trial that Ingram (who controlled the apartment) actually did the sales. (Ingram had already been convicted separately.) The defense told the jury that they would hear audiotapes a buy between Ingram and Smith and one with Butler's voice, so they could compare the voices. The Court, realizing they were two separate incidents, agreed it was improper and refused to permit the use of the tape comparison.

Det. Clark was also questioned about his presentation to the grand jury, and agreed that he had simply listed the charges and Butler's information, and then received an indictment.

Butler was convicted, and appealed.

ISSUE: Must a party provide a piece of evidence in discovery that the other side created?

HOLDING: Yes

DISCUSSON: First, the Court agreed that it was appropriate for the grand jury to return an indictment, although unusual with the presentation of no evidence. With respect to the discovery issue, the Court agreed that the defense had the tape and

[22] See Allegeier v. Com., 915 S.W.2d 745 (Ky. 1996); Sargent v. Com., 813 S.W.2d 801 (Ky. 1991).

should have made the prosecution aware of it, so they could prepare and rebut it, if necessary. The Court found it irrelevant that the tape was actually generated by the police department, but only that the defense were unaware that they were going to use the tape. (The Court also noted that the defense could have called Ingram, but chose not to do so.)

The Court upheld the conviction.

TRIAL PROCEDURE / EVIDENCE - UNCHARGED CRIMES

Elery v. Com., 368 S.W.3d 78 (Ky. 2012)

FACTS: Elery was accused of murdering McDonald, his girlfriend, In Jefferson County. The night before they had argued and McDonald had threatened to cut up Elery with a kitchen knife. McDonald struck her with a hammer multiple times, as she stabbed him. Elery wrested the knife away and stabbed her in the throat and then choked her. He cleaned up the place, wrote a suicide note, and left the apartment. He drove to Indiana, all the while drinking, and turned himself in to the Harrison County (IN) sheriff's office. He confessed to killing McDonald and agreed to be brought back to Louisville. He was interviewed at length.

He was charged, and ultimately convicted, of Murder and related charges. He appealed.

ISSUE: May evidence of uncharged crimes be provided to the jury?

HOLDING: No

DISCUSSION: Elery argued that his statements to the police was improperly admitted, as they included discussion of another, uncharged crime of murder that allegedly occurred at the same location and just after he killed McDonald. (There was no evidence that this crime actually occurred.) In fact, the Commonwealth agreed not to introduce the evidence and a redacted version was provided to the jury. However, the redactions were not complete and some mention of the other supposed crime was heard by the jury. The Court agreed that usually, KRE 404(b) prohibited the admission of such evidence. The Commonwealth argued that the error, if any, was harmless.

The Court reviewed the statements, in detail. The Court agreed that the statements that remained may have been confusing to the jury, but none were explicit enough to have created any real prejudice to Elery. The Court ruled the statements may have been technically improper, but declined to find that they were error.

Elery also objected to being denied admission of a PBT result taken at the beginning of his questioning by the Indiana authorities. It showed a BA of .283% and he wished to use it to show his extreme intoxication at the time of his confession. The Court agreed that a PBT was prohibited for providing DUI, but noted it had been found admissible for

other purposes. As such, it was improperly excluded. However, again, the Court noted that Elery's statements were consistent with those he gave later, when he was presumably less intoxicated, and he did testify as to his level of intoxication at the time. The recording itself would have helped the jury understand his degree of intoxication at the time.

Elery's conviction was upheld.

TRIAL PROCEDURE / EVIDENCE – HEARSAY

George v. Com., 2012 WL 1137880 (Ky. App. 2012)

FACTS: On April 1, 2009, George and Hollowell (his girlfriend) were driving to his mother's home. The couple crossed paths with 4 men, Chunn, Ragsdell, Woods and Pryor. George and Chunn had previous "multiple hostile dealings regarding money" George owed to Chunn. George and Chunn exchanged words and fought, and George was struck on the head. George pulled a pocket knife and stabbed Chunn, who ultimately died.

George was indicted for Murder and PFO, but eventually found guilty of reckless homicide. He was prevented from offering the testimony of Ellison, to the effect that George had told her that moments after the shooting that Chunn had, in the past, pulled a gun on him. (He had tried to testify to this at court, but it had been excluded.) George appealed his conviction.

ISSUE: Are all out of court statements legally hearsay?

HOLDING: No

DISCUSSION: The court agreed that George's out of court statements were not hearsay, as they were "not intended to prove the truth of the matter asserted" – that Chunn had pulled a gun on him. As such, his statements should have been admitted. The Court also agreed that he should have been permitted to bring out that he had told the detective questioning him about the threat, as well. However, because in fact, the defense was able to get the information in via another witness, who detailed two specific incidents where she witnessed Chunn pull a gun on George, the Court agreed it was harmless error.

George's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – RULE 7.24

Buchanan v. Com., 2012 WL 1478778 (Ky. 2012)

FACTS: In 2007, Allen and her son, Braden, moved in with Buchanan, in Fleming County. A year later, Allen and Buchanan had a daughter Kaylee. On July 20, 2008,

they went to a campsite with the children. Buchanan's stepmother, Bonnie, cared for Kaylee while the couple went fishing with Braden. Later that afternoon, at home, Buchanan brought Kaylee to Allen – Kaylee appeared to be unconscious. They called 911 and attempted resuscitation.

At the hospital, it was determined that Kaylee had a traumatic brain injury, likely from being shaken, and also had a leg injury that was a week old. Kaylee died a few days later and it was believed she'd suffered some form of blunt force trauma to the head. Both Allen and Buchanan were charged with Murder and Criminal Abuse, and tried jointly. Buchanan was convicted of manslaughter and appealed.

ISSUE: Must oral statements that are incriminating be provided to the defense?

HOLDING: Yes

DISCUSSION: Buchanan argued that it was error to introduce a statement made by Allen. The trial court "had entered a discovery order pursuant to RCr 7.24 requiring disclosure" of "any oral incriminating statement known by the Attorney for the Commonwealth to have been made by the Defendant to any witness." A statement made by Allen to another individual was introduced, although Allen denied having made the statement. The other witness was called to rebut Allen's denial of the statement.

The court agreed that it was a violation of the discovery rules not to disclose an incriminating statement, even if they only intended to use it in rebuttal. However, the rule only applies to incriminating statements and it was not clear that in fact, what Allen said was incriminating. In fact, it suggested that it was possible Allen felt that Buchanan was withholding information that might incriminate her, not the reverse.

Buchanan's conviction for Manslaughter was affirmed, but his conviction for Criminal Abuse was reversed for an unreviewed reason.

TRIAL PROCEDURE / EVIDENCE – DOUBLE JEOPARDY

Day v. Com., 367 S.W.3d 616 (Ky. App. 2012)

FACTS: On November 13, 2008, Day robbed Becker. However, Becker had no cash, so he was taken to a nearby empty house and tied up. Day took Becker's wallet and debit card, and demanded the pin number, telling him if he gave the wrong pin number he would return and kill Becker. When Day left, Becker was able to free himself and call police. Officers found Day at a nearby ATM and arrested him. He had already withdrawn a total of $1,000 from two ATMs. He confessed.

Day was indicted on Robbery, Burglary, Kidnapping, Unlawful Access to a Computer along with related charges. He was convicted on all counts and appealed.

ISSUE: Are Robbery and Unlawful Access to a Computer double jeopardy?

HOLDING: No

DISCUSSION: Day argued that the Robbery and Unlawful Access charges constituted double jeopardy, as "one continuous act with no separation in time and place." The Court looked to the Blockburger[23] test, and compared the elements of the two charges. The Court noted, they don't share a single common element.

However, the Court also looked to legislative intent, but again, concluded that Day committed "two separate, distinct acts." He committed the robbery by taking Becker's belongings by force and the unlawful access by using the card he had stolen, some time later.

The Court upheld both convictions.

TRIAL PROCEDURE / EVIDENCE – CONFRONTATON CLAUSE

McKee v. Com., 2012 WL 1478779 (Ky. 2012)

FACTS: On December 17, 2004, McKee was driving through Breathitt County, highly intoxicated. He collided with Wenrick's vehicle and Michelle Wenrick, the front seat passenger, died. Sgt. Noble (Jackson PD) gave McKee a FST, which he failed. He was arrested and a blood test was performed; it registered .018.

McKee was charged with DUI, Wanton Murder and Assault 4th. He was convicted, but later argued ineffective assistance of counsel. He was successful in this motion and was subsequently retried, and again convicted. He appealed.

ISSUE: Are all testimonial statements necessarily excluded under Crawford?

HOLDING: No (but see discussion)

DISCUSSION: McKee argued that Sgt. Noble repeated what another witness had said about the condition of McKee's headlights just prior to the crash. He argued that the statement was testimonial and should have been excluded under Crawford v. Washington.[24] The court, however, ruled that it was simply cumulative to other testimony presented, by witnesses that the headlights were off. The officer properly attributed it to a particular witness.

The Court upheld McKee's convictions.

[23] Blockburger v. U.S., 284 U.S. 299 (1932).
[24] 541 U.S. 36 (2004).

TRIAL PROCEDURE / EVIDENCE – PRIOR BAD ACTS

Cornette v. Com., 2012 WL 1479786 (Ky. App. 2012)

FACTS: On September 23, 2009, Angela Cornette requested an EPO against her husband, Lindsey. She was accompanied by a Martin County deputy sheriff to her home, to retrieve belongings. While there, she consented to a search of the premises and a bottle meth lab was found. Lindsey was charged with manufacturing methamphetamine.

On October 15, Lindsey and Mollette appeared on a list, having both bought pseudoephedrine from a Wal-Mart in Louisa. The Sheriff's office obtained a search warrant for the Cornette residence. They found both Angela and Lindsey there, along with a small amount of methamphetamine and evidence suggesting a plan to manufacture methamphetamine.

Angela, Lindsey and Mollette were tried together. Angela was convicted and appealed.

ISSUE: May prior bad acts be introduced as evidence to prove intent?

HOLDING: Yes

DISCUSSION: Angela argued that it was improper to admit evidence of the methamphetamine lab located on the first visit, as she was not charged with that lab. The Court addressed the evidence under the provisions of KRE 404(b), prior bad acts, as the Commonwealth sought to have it admitted to show her intent to manufacture. The Court agreed that it did prove Lindsey's intent, and since she was charged with complicity, it was critical that Angela be shown to have intentionally participated in the crime as well.

Angela's conviction was affirmed.

Hammond v. Com., 366 S.W.3d 425 (Ky. 2012)

FACTS: In June, 2006, Sawyers, Cherry and Williams were all murdered in Louisville. Sawyers, specifically was murdered at the home of Sheckles, who witnessed the killing. Investigators linked Hammond with Cherry, who was apparently then murdered to keep him from testifying about the Sawyers' murder. The charges were dismissed in the Sawyers/Cherry murders, however, because Sheckles could not be found to testify. The Williams case was dismissed when a key witness refused to testify.

Hammonds was subsequently re-indicted on both claims and the three cases were consolidated. Hammond was convicted on all three murders and appealed.

ISSUE: May murders be consolidated into one trial?

HOLDING: No (but see discussion)

DISCUSSION: The Court agreed that the two sets of crimes should not have been consolidated and that doing so was prejudicial to Hammond. There was "no serious contention" that the Williams case was connected to the Sawyers/Cherry murder. Although "temporal and geographic proximity" may be relevant in proving a connection between crimes, it was not sufficient in this situation. Further, the Court agreed that doing so was extremely prejudicial to the trial and warranted reversal of his convictions.

The Court elected to also address Hammond's objection to the introduction of Sheckles' recorded statements to the police. Sheckles was murdered (allegedly at Hammonds' behest) prior to his second trial. Under normal circumstances, her statement would be not admitted under the hearsay rules and Hammonds's Sixth Amendment right to confront witnesses.[25] The prosecution argued that the statements should be admitted under the "forfeiture by wrongdoing" exception to the hearsay rule.[26] However, no formal hearing was held on that issue nor did any witnesses testify to the link between Sheckles' murder and Hammonds, instead only a "stack of documents" relating to the investigation of her death was proffered to the court.

The Court looked to Parker v. Com.[27] and agreed that a hearing is necessary, noting that evidence is necessary to prove the connection. It was incumbent to show that the documents "were, in fact, what they were purported to be and that the information upon which it relied to make its case was credible." It was not enough to presume the documents were reliable simply because they were accumulated by the police in investigating a homicide. The Court noted that if the contention that Hammonds was involved with the murder is "well-documented" is true, it should be a simple matter for the prosecution "to identify by chapter and verse the parts of documents that establish those facts."

The Court reversed Hammonds' convictions.

TRIAL PROCEDURE / EVIDENCE – PLEA BARGAINING

Clutter v. Com., 364 S.W.3d 135 (Ky. 2012)

FACTS: On April 2, 1994, Casey, accompanied by Clutter and two others, went to a trailer in Florence. Two left for a short while, leaving Casey with Clutter. When they returned, Casey told the others that she had been raped by Clutter. Clutter then attacked her, tried to drown her, strangled her and eventually, slit her throat. The three

[25] Crawford v. Washington, supra.
[26] KRE 804(b)(5). the hearsay rule does not apply to "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." See also Davis v. Washington, 547 U.S. 813 (2006).
[27] 291 S.W.3d 647 (Ky. 2009).

men then dismembered her and discarded her body parts across southern Ohio. The investigation went cold.

In 2000, while incarcerated in federal prison for other reasons, Clutter sought a deal for clearing up the Casey homicide. However, the AUSA was not interested in making a deal. The Kentucky Commonwealth's Attorney had outstanding warrants in Gallatin County on yet another case involving Clutter. However, just based upon what they had been told so far, the Boone County investigator made the connection between Clutter and the other two men with the Casey homicide, and Clutter was indicted for murder, Rape and Tampering with Physical Evidence.

Clutter moved for exclusion of any statements made by McDermott (Clutter's attorney) during plea negotiations. The court agreed and prohibited the prosecution from calling McDermott or using any of his statements. However, when Clutter raised the issue of the investigation at trial, the Court agreed that it was proper for the detective to explain why he focused on Clutter as a suspect. Clutter was convicted of Murder, and appealed.

ISSUE: May plea discussions be introduced against a defendant?

HOLDING: No (but see discussion)

DISCUSSION: Clutter claimed error on the basis of KRE 410(4), as statements made in the course of plea discussions. However, the rule noted that the discussions must be made with the involvement with the prosecutor. The discussions took place with a Boone County officer, although at the time, there were no active Boone County charges. The detective never stated or implied he was speaking with the authority of any prosecutor at all.

Clutter's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - TESTIMONY

Durham v. Metzger, 2012 WL 1556490 (Ky. App. 2012)

FACTS: On May 18, 2011, Metzger requested a DVO accusing Durham of throwing something and hitting her. She alleged previous instances of abuse, as well. She had only lived with him for about one week, although they'd been dating for some time. She admitted that she'd stayed with Durham for two nights after the most recent act of abuse. A DVO was entered and Durham appealed.

ISSUE: May irrelevant evidence be introduced in testimony?

HOLDING: No

DISCUSSION: Durham contended that the family court improperly kept him from questioning Metzger about whether she'd had sex with Durham following the most recent alleged abuse – the trial court had ruled it irrelevant. The Court agreed that simply because Metzger engaged in sex with Durham does not "make it more or less probable that Metzger was in fear of imminent physical injury" from Durham.

The DVO was upheld.

Gaither (Estate) v. Justice and Public Safety Cabinet, 2012 WL 1556313 (Ky. App. 2012)

FACTS: In 1995, Gaither, age 17, was in trouble for assault. He was approached about becoming a CI for drug trafficking and agreed. After he turned 18, he began to serve as a CI for the police and earned more than $3,000 over ten months. He was brought in to testify, under escort, before the grand jury, in two cases in Marion and Taylor counties. A member of the Taylor County grand jury contacted Noel, the drug trafficker, and revealed that Gaither was the witness. The next day, on July 17, 1996, he was to meet Noel to buy more drugs, but he was ordered by his handlers not to get into the car with Noel. However, despite that, he did so. KSP troopers followed the vehicle, continuing to monitor the transaction, but lost track of him. Ultimately, it was learned that Gaither had been taken to Casey County, tortured and murdered. Both Noel and the grand juror who revealed Gaither's identity were convicted for their actions.

Gaither's mother, representing his estate, filed with the Kentucky Board of Claims, arguing that the troopers were negligent. The case was initially dismissed and then reinstated. In 2009, the Board ruled that the troopers' actions were ministerial, rather than discretionary, and that they were negligent in their supervision of Gaither and for allowing him to testify with insufficient protection. She was given an award, but less than she requested, and both side appealed.

The Franklin Circuit Court reversed the Board, finding the troopers' actions to be discretionary and thus not subject to a negligence lawsuit. Again, both sides appealed.

ISSUE: Is monitoring a CI a discretionary act?

HOLDING: Yes

DISCUSSION: The Court began by noting that "determining what is ministerial and what is discretionary and where the line between the two lies is not a straightforward task." The Court reviewed cases involving both types of acts.

The Court stated that discretionary acts require the exercise of reason and discretion in a course of action. Ministerial acts involve "**"**investigative responsibilities as set out in regulations, which were particular in their directive."[28]

[28] Stratton v. Com., 182 S.W.3d 516 (Ky. 2006).

The Court concluded that "an act is purely ministerial if statutes and/or regulations impose a clearly defined duty to perform an act, and the performance of the act requires little, if any, judgment, interpretation, or policy-making decisions." But "when an actor must choose between or among various courses of action, and that choice involves the exercise of judgment and/or overriding policy issues, the act is discretionary." The Court acknowledged that there are also "mixed cases" involving both, however.

Gaither pointed to a KSP General order to illustrate three specific duties that were violated by the troopers. However, the Court noted that while the officers had a duty to monitor the CI, the "execution of the undercover operation was left to the judgment and discretion of the detectives." As such, their actions were discretionary and not ministerial and they are immune from suit.

The Court affirmed the decision of the Circuit Court.

Kareken and Kehrt (Mercer County Sheriff), 2012 WL 1649105 (Ky. App. 2012)

FACTS: On August 7, 2008, Kareken was involved in a single car accident in Mercer County. She was handcuffed and Tased at the scene, She later alleged that she had suffered a seizure and could not respond to the deputies, and that the deputies were aware of that. Kareken was diagnosed with epilepsy following the wreck. However, Deputy Moberly testified that he came across the wreck and found Kareken "acing very strange" … "as if she was under the influence of drugs." She "kept screaming and cursing at him" and tried to get away. They struggled and she was placed in a cruiser, and eventually taken to the ER. She struck a citizen at the scene, as well. The possibility of a seizure was mentioned in the use of force report, because it was the only possible medical issue he could think of. Sheriff Kehrt testified later that he felt the use of force was justified, following an investigation.

Kareken sued, but the case was dismissed against all deputies and the Sheriff. Kareken appealed.

ISSUE: Is the development of a policy discretionary?

HOLDING: Yes

DISCUSSION: All of the Mercer County defendants argued that they are entitled to qualified immunity. The court noted it was undisputed that she was combative, even after being placed in handcuffs. The Court looked to Everson v. Leis[29] and agreed that that Kareken was actively resisting being restrained and as such, the use of force was reasonable. The use of the Taser was also reasonable and within policy. With respect to the Taser policy, the Court noted there was no legal mandate to even have a policy on Tasers, and as such, creating the policy itself was discretionary.[30] There was no

[29] 556 F.3d 484 (6th Cir. 2009):
[30] Williams v. Ky. Dept. of Educ., 113 S.W.3d 145 (Ky. 2003)

evidence the policy was created in bad faith and as such, the Sheriff was also entitled to qualified immunity.

The Court upheld the decision to dismiss all defendants.

WORKERS' COMPENSATION

Myers v. Best Buy, 2012 WL 1254773 (Ky. App. 2012)

FACTS: On August 13, 2008, Myers suffered a back injury at work at Best Buy. At the time, she was also employed as a newspaper delivery person. She later stated she believed that Best Buy was aware of her concurrent employment. Myers continued newspaper delivery for two weeks following her back injury and was restricted to light duty at Best Buy. She was eventually completely taken off work completely and went through a multitude of medical exams and treatments. In 2010, she was awarded a 7% permanent rating of disability. She appealed, however, when they did not take her loss of concurrent wages into consideration in determining the award.

ISSUE: If an employee has a secondary job known to an employer, and the employee is injured in the primary job, must the employer also cover wages on the secondary job?

HOLDING: Yes

DISCUSSION: The Court noted that under KRS 342.140(5), "'if an injured employer has knowledge of the [secondary] employment prior to the injury,' the wages from all employment are to be 'considered as if earned from the employer liable for compensation.'" The Court noted, however, that the ALJ[31] ruled that nothing Myers submitted indicated that she continued her newspaper delivery job while still working at Best Buy and that was fatal to her case. The Court reversed part of the case, for other reasons, but declined to overturn the ALJ on the issue of concurrent employment.

NOTE: *Although this case obviously does not directly involve law enforcement, many officers have secondary employment. It is important that all employers are aware of other concurrent employment, should the employee be injured while working at one of the jobs.*

WHISTLEBLOWER ACT

Wilson v. City of Central City, 372 S.W.3d 863 (Ky. 2012)

FACTS: Wilson was an employee of the Central City Water Works Department. During his time there, he became concerned with certain safety issue and reported them to the appropriate regulatory agencies. As a result, the agency was the target of

[31] Administrative Law Judge

multiple written reprimands in the late 1990s from the Kentucky Division of Water. Wilson continued to make reports to OSHA and the Division of Water. Brown, Wilson's supervisor, refused to talk to the Division of Water about the problems.

In 2003, Wilson allegedly used his work computer for personal reasons. This was confirmed and Wilson was fired. The termination was affirmed by the city council and he filed suit, arguing that he was terminated for contacting authorities about the problems. The trial court ruled in favor of Central City, holding that Wilson was an at-will employee and that any reports he made were not made pursuant to the Whistleblower Act[32] or were "too temporally attenuated to be a 'contributing factor' in his termination." He further appealed and the Kentucky Court of Appeals affirmed, holding, instead, that Central City, as a municipality, was not a "political subdivision" and was not covered by the Act at all.

Wilson appealed.

ISSUE: Is a City subject to the Whistleblower Act?

HOLDING: No

DISCUSSION: The Court noted that previous opinions had "muddied the waters" with respect to the distinction between a city, a municipality and a municipal corporation. The Court noted that the differences were becoming increasing important because many services are provided by "non-city municipal corporations" – such as fire taxing districts. The Court agreed, however, that the legislative history of the Act indicated that the General Assembly intended to exclude cities from its protections. Counties function as administrative subdivisions of the state, but cities "manage purely local governmental functions."

The Court agreed Central City was not covered by the Act, and upheld the decision in favor of the city.

OPEN RECORDS

Kentucky New Era, Inc v. City of Hopkinsville, 2012 WL 1365863 (Ky. App. 2012)

FACTS: Hunter, a New Era (Hopkinsville) reporter, submitted an open records request to inspect copies of citations at the Hopkinsville PD, for the period from January 1 through August 31, 2009, and which resulted in specific charges. Hopkinsville declined to provide records for "open cases, records involving juveniles, and redacted certain identifying information of victims, subjects and witnesses" from those reports it produced."

[32] KRS 61.101.

New Era appealed the issue to the Attorney General, which rendered a decision that Hopkinsville had not met its burden to lawfully refuse production under KRS 61.878. Hopkinsville appealed that decision and the trial court ruled in favor of New Era. The trial court ruled that HPD had not met its burden with respect to juveniles who were not defendants or the identifying information that was redacted from reports produced. In a reconsideration, however, it agreed that it could redact Social Security numbers, driver's license numbers, home addresses and telephone numbers, under KRS 61.878(1)(a), as the privacy interest of the individual in those outweighed the public interest.

Both parties appealed.

ISSUE: May agencies redact information from reports in an Open Records request?

HOLDING: Yes

DISCUSSION: First, New Era argued that permitting the redaction of the information was improper, conceding, however, that redaction of Social Security numbers was appropriate. The Court, however, disagreed, looking to Zink v. Commonwealth, Dep't of Workers' Claims, Labor Cabinet.[33] The Court noted that the information redacted passed the first prong of the test laid out in Zink, that which required that the information was such that in which an individual expects at least some degree of privacy. The second prong, an evaluation as to whether the public interest outweighs that private interest was also easily hurdled. The Court agreed that although providing specifics would make the newspaper's job easier, that it did not reveal anything about the police department's "execution of its statutory functions."

With respect to the appeal by the Hopkinsville Police Department, the Court reversed the trial court's decision and agreed that it was proper to redact the names of juveniles, holding that the "potential adverse impact on juvenile victims or witness outweighs" any public interest in that information.

The Court further ruled that it was not improper for Hopkinsville to return a "blanket redaction" and that it did not "necessarily violate the Open Records Act," by doing so. It was required, however, that if HPD was challenged about such redaction, it must meet the burden to justify the redaction.

JURISDICTION

Johnson v. Com., 2012 WL 2051961 (Ky. App. 2012)

FACTS: Johnson was indicted in Powell County as a result of an investigation of UNITE officers, acting under the authority of the Attorney General's office. However, at the time UNITE was without jurisdiction to operate in Powell County. Johnson moved

[33] 902 S.W.2d 825 (Ky. App. 1994).

for dismissal of the evidence and the trial court denied the motion. Johnson took a conditional guilty plea and appealed.

ISSUE: May the Attorney General initiate a drug investigation?

HOLDING: No

DISCUSSION: The court agreed that KRS 15.200 makes it clear that the Attorney General investigators must be invited by local authorities to do investigations in most situations. The Attorney General argued that it had the common law power to investigate, despite its own earlier claim, in a different case, that it was limited to advising as it was not a law enforcement agency. Since there was no invitation to investigate in this case, the Court vacated the plea.

MISCELLANEOUS

Mitchell v. University of Kentucky, 366 S.W.3d 895 (Ky. App. 2012)

FACTS: Mitchell, an anesthesia technician at UK Chandler Medical Center and a graduate student, as well, had a valid CCDW license. On April 22, 2009, Mitchell's coworkers were under the impression that he had a firearm in his employee locker and reported it to hospital administration. Police and hospital administrators searched Mitchell's locker with his permission, finding no firearm. Mitchell informed officers that he had a CCDW license and admitted that he kept a firearm in his vehicle, which was parked on UK property. UK suspended and then terminated Mitchell's employment for violation of its policy prohibiting possession of a deadly weapon on University property or while conducting University business.

Mitchell filed suit alleging termination in violation of public policy, specifically, his right to bear arms as set forth in the United States Constitution, the Kentucky Constitution, and the Kentucky Revised Statutes. The circuit court granted summary judgment in favor of UK. Mitchell appealed.

ISSUE: Is a university employee, who has a license to carry a concealed weapon, authorized to keep a weapon in his car despite any restrictions the university placed on the possession of deadly weapons on university property?

HOLDING: Yes

DISCUSSON: KRS 237.106(1) provides that “no person…shall prohibit any person who is legally entitled to possess a firearm from possessing a firearm, part of a firearm, ammunition, or ammunition component in a vehicle on the property.” While KRS 237.115(1) gives a university the right to “control” all deadly weapons on *all property* it owns or controls, it is limited by KRS 527.020. KRS 527.020(4) and (8) specifically permitted Mitchell to store a firearm in his vehicle, even while on University property.

The judgment of the Fayette Circuit Court is reversed and remanded.

SIXTH CIRCUIT

42 U.S.C. §1983 - SEARCH & SEIZURE - ARREST

Rhodes v. Pittard and City of Murfreesboro (TN), 2012 WL 2302266 (Ky. 2012)

FACTS: On May 12, 2007, an altercation broke out at Rhodes's home, between Rhodes and Pittard, an Orkin sales agent. Viewing Pittard as an unwelcome solicitor, Rhodes pushed him off the porch. Pittard called the police. Rhodes admitted to Deputy Scott (Rutherford County SD) what he'd done; he was arrested. Although charged with assault, originally, the offense was reduced to offensive touching. When Pittard was not available to testify, the charges were dismissed.

Rhodes filed suit against Scott and the City, under 42 U.S.C. §1983, arguing that he was unreasonable seized by the arrest. The District Court granted summary judgment to the defendants and Rhodes appealed.

ISSUE: Does the validity of an arrest depend upon whether a crime was actually committed?

HOLDING: No

DISCUSSION: The Court looked to state court to decide if probable cause existed for the seizure and arrest. The Court noted that the "validity of the arrest does not depend … on whether Rhodes actually committed a crime" but only whether there was probable cause for the deputy to believe that a crime had occurred. The Court agreed it was reasonable for the deputy to believe that unreasonable force had been used against Pittard, even if he was legally a trespasser, and that this constituted a crime. Even if Rhodes had a defense, it was not the responsibility of the officer to hold, in effect, a "quasi-trial" before making an arrest.

The Court upheld the dismissal.

Nettles-Nickerson v. Free, 687 F.3d 288 (6th Cir. 2012)

FACTS: On May 8, 2009, Nettles-Nickerson visited a local bar in Okemos, MI. She drank enough to be too impaired to drive. Another patron saw her stagger towards her car, fall, and get back up, and eventually get into her Hummer. She started the car but apparently did not drive off. The patron called 911.

Officers Free, McCready and Harris arrived. Officer Free approached the vehicle and saw that it was running, but in park. He thought the driver was sleeping but when he announced himself, she immediately opened her eyes. He saw her eyes were "watery and bloodshot" and that she "smelled of intoxicants." She got out upon request but could not perform the FSTs successfully. A PBT came back at .165. Officer Free arrested her for operating the vehicle while intoxicated.

However, the state court ruled that she was not, in fact, operating the vehicle and dismissed the case against her. Nettles-Nickerson sued the officers. The District Court agreed that a reasonable officer could have believed she was unlawfully operating her vehicle and awarded qualified immunity to the officers.

ISSUE: Is an arrest made upon a reasonable interpretation of a state statute valid?

HOLDING: Yes

DISCUSSON: The Court noted that the only question was whether she was, in fact, operating her Hummer under Michigan law. In Michigan, "operating" is defined as "being in actual physical control of" the vehicle. It noted that nothing impeded Nettles-Nickerson from driving the vehicle. The Court agreed that Michigan case law was vague on the issues, but the fact that she had started her car and according to witnesses, depressed the brake pedal, suggested she was, in fact, operating the vehicle. The Court found it "perfectly reasonable" for the officers to believe an arrest was permitted under the circumstances.

The Court noted, that the "law must be clearly established" to justify a lawsuit and in this case, "the police officer commendably consulted with each other before" deciding to make the arrest.

The decision of the District Court was upheld.

U.S. v. Williams, 475 Fed.Appx. 36, 2012 WL 1138999 (6th Cir. 2012)

FACTS: On September 5, 2007, Cincinnati PD did an undercover "drug buy-bust." They were in plainclothes and would buy drugs and then arrest the seller. Officer Longworth, one of the officers involved, was riding with a CI. Williams flagged down their car and solicited a sale of a rock of cocaine for $20. Officer Longworth put out a radio call and Officer Edwards and Grubb, also in an unmarked car, spotted Williams less than two minutes later. Williams fled from them on foot. Officer Edwards saw Williams reach into his waistband and remove a "dark object" Edwards thought was a handgun. Officer Edwards drew his weapon and "heard metal hit concrete." The chase resumed but eventually Edwards stopped. Edwards returned to the place where he had heard the sound and found a loaded pistol.

Eventually, another officer caught Williams and matched the $20 bill in his possession with the one he'd gotten from Officer Longworth. (For an explained reason, the bill was not introduced in court, however.) Longworth also identified Williams.

Williams was indicted on drug trafficking and possession of the gun and moved for suppression. The motion was denied and he took a conditional guilty plea. He then appealed.

ISSUE: May fleeing the scene ripen suspicion into probable cause?

HOLDING: Yes

DISCUSSION: Williams argued that the officers lacked probable cause to arrest him. The Court agreed that the initial officers who encountered Williams were suspicious of him because he matched the description, and thus it was appropriate to try to stop him. When Williams fled, the officer's "reasonable suspicion ripened into probable cause." The Court agreed that while no officer specifically saw a gun, there was sufficient evidence to arrest him even absent his possession of a weapon.

The Court upheld the denial of the motion to suppress.

SEARCH & SEIZURE – WARRANT

U.S. v. Ranke, 2012 WL 1547985 (6th Cir. 2012)

FACTS: Brown was incarcerated in the federal prison. He received an Easter card containing photos of a nude male. The officials searched his cell and found handwritten notes and a personal address book with a listing that matched the sender of the card. The notes, in "crude code" indicated the sender's desire to have sex with young boys. The correspondent (Ranke) detailed his prior sexual experience with children. After further investigation, the officials received a search warrant for his residence and his post office boxes. They learned that Ranke actually didn't live at the first address, his sister's home, although he used it on occasion as a mailing address. She gave them his actual address and told the officers he worked with autistic children. They confirmed the information and got a search warrant for the second address. There, they found his locked bedroom and inside, a large amount of child pornography, marijuana and a gun.

The affidavit described the initial images sent to Brown as "computer generated photographs" and detailed the investigation and the follow-up.

Ranke was charged initially for the firearm, under state law, and subsequently in federal charge for the child pornography. He moved to suppress the evidence of the searches and was denied. Ranke took a conditional plea to mailing child pornography and appealed.

ISSUE: Are computer generated photographs presumed to be of real persons?

HOLDING: Yes (see discussion)

DISCUSSION: Ranke seized on the description of the photos as "computer generated" arguing that under Ashcroft v. Free Speech Coalition, "virtual" child

pornography is in fact legal and protected under the First Amendment.[34] The Court however, found the argument without merit. The Court agreed that the phrase used by the officer is "somewhat problematic given commonly-used computer terminology and the legal distinction" made in Free Speech Coalition. The Court noted that the phrase "computer-generated" coupled with "photograph" suggested they were of a real child, however, and not CGI[35]. At best, the phrasing was "internally contradictory." The Court agreed it might have been better to have more investigation by the judge but found that it did not merit suppression.

He also argued that the detective's description suggested he did not actually see the photos, which were not attached to the affidavit. The Court agreed, however, that the affidavit was sufficient based upon the fact that the officer consulted with those who had seen the photos. The letters found in the cell were, in fact, submitted and that alone supported the subsequent search warrant. The inmate provided information to the authorities that further corroborated the investigation.

The Court affirmed the denial of the motion to suppress.

U.S. v. Woodbury, 2012 WL 2161634 (6th Cir. 2012)

FACTS: The apartment of Woodbury and Boyd was searched pursuant to a warrant. The warrant suggested that the building was a single residence when in fact, it was two separate apartments, one to each floor, although it had only one address, apparently. The affidavit asserted that Boyd was selling drugs from the address but did not distinguish from which unit, as the officers were apparently unaware of the dual residences.

Woodbury (and Boyd) were charged. Woodbury moved for suppression, which was denied. He took a conditional guilty plea and appealed.

ISSUE: Does the discovery that there are two living spaces in a single address invalidate a warrant?

HOLDING: No

DISCUSSION: The Court agreed that the officers' suspicion was not dissipated when they entered and discovered two separate living spaces, as the Court noted that it "properly extended to separate structures within the curtilage of the residence." The Court found that their decision to continue the search was reasonable and upheld the plea.

[34] 535 U.S. 234 (2002).
[35] Computer generated image.

U.S. v. Dobbins, 2012 WL 1662453 (6th Cir. 2012)

FACTS: On October 3, 2008 Metro Nashville PD (MNPD) went to a location to make a controlled buy with the help of a CI. Det. BeCraft, with other officers, followed the CI and watched him enter an apartment, coming out in a few minutes with cocaine. The next day, the detective got a warrant, which was executed on October 6. They got no answer to a knock so the officers forced entry. They found Dobbins at the toilet, where he'd apparently tried to flush several baggies of cocaine. Muse was found in another room. Both were given Miranda.

The officers found cocaine, a firearm, ammunition and other items during the search. Because Dobbins was a felon, he was indicted under federal law for its possession. He moved to quash the search warrant and suppress the evidence. That was denied so he then asked for the identity of the CI to be given to his attorney. The Court agreed, but it is not clear that was actually done. At trial, Det. BeCraft testified that the CI had not given him Dobbins' name, but instead had told him he'd bought drugs at a particular location and described the seller's physical appearance and nickname. That information was not in the report provided to the defense, but was provided at the time of trial as part of the officer's notes. Apparently the nickname, however, had been provided to the defense prior to trial via email. The judge refused to giving a limiting instruction.

Dobbins was convicted on the drug charge, but not the weapon charge. He appealed.

ISSUE: Should a warrant for a multi-unit building state which unit is to be searched?

HOLDING: Yes

DISCUSSION: First, Dobbins argued that the search warrant did not limit the search to only his unit, but in fact, authorized a search of the entire triplex. Looking to Maryland v. Garrison, the Court employed the "two-part test for determining whether a description in a warrant is sufficient to satisfy the particularity requirement: (1) whether the place to be searched is described with sufficient particularity as to enable the executing officers to locate and identify the premises with reasonable effort; and (2) whether there is reasonable probability that some other premises may be mistakenly searched."[36] The Court noted that "a warrant describing an entire building when cause is shown for searching only one apartment is void."[37] However, in the warrant in question, the language did specify only a particular "target door" – and presumably the unit behind it.

With respect to the failure to disclose the notes, the court noted that it never ordered the release of "all of its written records related to the" CI. Specifically, it ordered the prosecution to disclose "(1) the confidential informant's identity and criminal record, if

[36] 480 U.S. 79 (1987).U.S. v. King, 227 F.3d 732 (6th Cir. 2000).
[37] U.S. v. Votteller, 544 F.2d 1355 (6th Cir. 1976).

any; and (2) whether the confidential informant said he got drugs from Dobbins." Dobbins argued that the information he did not receive was material to his defense. The Court agreed that although the information likely would have caused the defense to change its strategy, it was not enough to render the information material.

Dobbins' conviction was affirmed.

Gordon v. Louisville Metro / Jefferson County Metro Government, 2012 WL 3104491 (6th Cir. 2012).

FACTS: In October, 2006, allegations were made that an employee of Commonwealth Security, Inc. misrepresented themselves as a sworn officer. The company was owned by Gordon. Upon investigation, it was discovered that other CSI employees "were being held out as sworn officers" who were not so, by Gordon, who billed at a higher rate for sworn officers. LMPD got a search warrant for Gordon, his home, his office, his vehicles and his ex-wife (Smith). They stopped Smith as she was leaving the house on a traffic stop and returned her to the home, along with her two children. (Eventually the children were allowed to leave with their grandmother.)

The officers searched a safe, with a code given to them by Gordon. Gordon later alleged that officers stole about $5,000 of $11,000 in cash that was in that safe, which officers denied. He also claimed that the officers damaged the home during the search, by "ripping" the door from a Coke machine, opening Christmas presents and the boxes for collectible dolls (reducing their value). The police refuted those assertions with the inventory of the items seized and providing signed affidavits denying other allegations.

On January 31, 2007, the criminal case was presented to the grand jury and Gordon was indicted on multiple counts of theft by deception and one county of forgery. He was, however, acquitted on all counts. Gordon and Smith filed suit under 42 U.S.C. §1983 related to the detention and the search, and later added malicious prosecution. The U.S. District Court ruled in favor of the defendant officers and Gordon and Smith appealed.

ISSUE: Are officers' collectively responsible for actions taken during a search?

HOLDING: No

DISCUSSION: The Court noted that neither Gordon or Smith offered any evidence as who which officer was responsible for the alleged theft or damage, noting that "conclusory allegations of officers' collective responsibility" are not enough to defeat a summary judgment motion.[38] The court agreed that it is improper to unreasonably destroy property during a search but reiterated that collective liability is improper, liability must be direct. The court agreed it was proper to detain persons during a search

[38] Wilson v. Morgan, 477 F.3d 326 (6th Cir. 2007).

warrant, even if they are not named (which Smith was).[39] The court noted that "limited or routine detention of residents pursuant to a valid search warrant is lawful, even categorical." Returning Smith to the house to help them gain entry was proper, and both she and her car were listed on the warrant. Supervising the children closely while they were at the house might have been "overly cautious," but it was lawful. (Although the Court did not mention this issue, they were turned over to their grandmother about 20 minutes after their arrival at the house.)

With respect to the delay in the traffic stop, the Court agreed that at the time, there had been no "exact number of minutes or miles that police may follow" before making the stop. As such, qualified immunity was appropriate.

The Court affirmed the dismissal of the claims.

U.S. v. Baylis, 475 Fed.Appx. 595, 2012 WL 1216521 (6th Cir. 2012)

FACTS: In February, 2008, Officer Moore (Oak Ridge PD) made a traffic stop. The driver agreed to be a CI and provided information that she'd performed that service for other local agencies. She later made four drug buys from Trevelle Baylis, three of which were at a specific location. (He did not live there, but used the house for that purpose with the resident's permission.) On April 4, Moore got a search warrant. They found Anthony Baylis present, along with a gun and an assortment of drugs.

He was indicted on drug possession and trafficking, along with possession of the gun.[40] He moved for suppression. The trial court agreed that the warrant's underlying cause was flawed, since although they knew he sold drugs from there, there was no proof he lived there or stored drugs there. However, the trial court did not suppress the evidence, finding a "reasonably trained officer would have believed the warrant was valid."

Baylis was convicted and appealed.

ISSUE: Is it reasonable to presume that evidence of drug-dealing will be found where the drugs are located?

HOLDING: Yes

DISCUSSION: The Court agreed that when the police watch a suspect repeatedly sells drugs out of the same location, it is reasonably to believe drugs (or their proceeds) will be found there. Even though Baylis did not reside there, when a suspect has repeatedly sold drugs from a house, "that is a horse of a different color." The CI

[39] Muehler v. Mena, 544 U.S. 93 (2005); Michigan v. Summers, 452 U.S. 692 (1981); U.S. v. Bohannon, 225 F.3d 615 (6th Cir. 2000). The Court agreed they probably should have stopped her sooner, but ruled that issue was not important in this case. U.S. v. Cochran, 939 F.3d 337 (6th Cir. 1991).
[40] He allegedly did not actually reside at that home.

witnessed the deals being done from that location. "Evidence of drug-dealing is usually likely to be found in the place where the drug-dealing occurred."

The Court upheld the denial of the suppression motion.

U.S. v. Gilliam, 2012 WL 2505548 (6th Cir. 2012)

FACTS: On March 19, 2009, officers executed a search warrant on Gilliam's home, seeking child pornography. He was charged under federal law for possession and production of it. Gilliam moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Must a search warrant make a link between a crime and a location?

HOLDING: Yes

DISCUSSION: Gilliam argued that the warrant was invalid because the affidavit lacked probable cause. The affidavit detailed information from Trooper Brashears (KSP) who stated he was working on a complaint from four minors who alleged they had seen the images on Gilliam's computer, in his bedroom. They clearly described Gilliam's residence and sought photographs, computers and the like. The Court agreed that the affidavit clearly made a link between the crime and the residence, and incorporated information from known informants with first-hand knowledge.

The Court upheld the denial of the motion to suppress.

U.S. v. Carney, 675 F.3d 1007 (6th Cir. 2012)

FACTS: On two separate occasions, counterfeit bills were passed in Louisville. The passer was identified as having driven a SUV with a specific plate number. In the second instance, a store clerk identified Carney as the customer, from a choice of three photos. (There was confusion about another individual being identified, King, who apparently strongly resembled Carney.) The vehicle belonged to a third party, but officers on surveillance saw Carney driving it. A check with Carney's probation officer indicated he lived with the owner of the vehicle.

Secret Service and Louisville Metro officers went to the apartment and requested permission to search the apartment and the vehicle. Carney refused. The officers determined they had probable cause and arrested Carney. Two officers stayed at the apartment while others transported Carney and went to get a search warrant. While at the apartment, the officers heard someone inside. Upon verifying that no one was supposed to be there, they went inside, out of a concern that someone might be destroying evidence. They found Dewitt, questioned him and eventually released him.

The search warrant was obtained and executed. Officers found a handgun hidden in the toilet tank, but no counterfeit money. A later PSR indicated that they did find two firearms, ammunition, counterfeit currency and a printer with general bills taped to the scanner bed. It also indicated a gun was found in the SUV.

Carney was indicted for counterfeiting and having a firearm. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Do flaws or omissions necessarily invalidate a warrant?

HOLDING: No

DISCUSSION: Carney argued that there were misstatements and omissions in the warrant affidavit, but the Court ruled there was no showing that the affiant made any such statements "knowingly and intentionally or with reckless disregard for the truth." The Court noted that several officers were involved, and that the affiant officer was using information reported to him by other officers and may have mischaracterized what was told to him. The affidavit failed to indicate that a clerk did not identify Carney from a photo lineup (his photo was not even in the lineup) but that she did identify someone else. The Court agreed that the flaws and omissions were insufficient to invalidate the warrant. Further, the Court agreed there was sufficient evidence to search both the house and the SUV.

Finally, even if the warrant was, in fact, legally insufficient, it was sufficient to survive a good faith analysis.

Carney's plea was upheld.

<u>U.S. v. Hoang</u> (Natalia and Liem), 2012 WL 2379917 (6th Cir. 2012)

ISSUE: In May, 2009, Det. Alderink (Kent County, MI, SO) submitted a search warrant affidavit for Hoang's home, seeking evidence of a marijuana growing operation.

The warrant set out the following:

> Alderink has 13 years of law-enforcement experience, is currently a detective in a narcotics division, and is experienced in investigating narcotics cases.
>
> • An anonymous tipster informed Silent Observer1 on an unspecified date that Liem Hoang was growing marijuana in his basement at 6376 Glenstone Dr SE, Grand Rapids, MI 49546; that the tipster has seen the marijuana; that Liem lives at the Glenstone property with his ex-wife Natalia Hoang; and that Liem has a prior felony conviction involving ecstasy.
> • Alderink verified through state records that Liem and Natalia lived at the Glenstone property.

• Alderink confirmed the tipster's statement that Liem had a prior felony conviction involving ecstasy. Liem was convicted in 2001 for importing MDMA.
• Alderink found a website printout about growing marijuana in the trash at the Glenstone property on April 29, 2009.
The utility records for the Glenstone property, which were in Liem's name, were obtained on April 23, 2009 and revealed that electricity use for the home increased between 27% and 131% per month between June 2008 and March 2009 as compared to the same month of the prior year. The average increase in electricity used for that 10-month period compared to the same period of the previous year was 64%.2 The records showed the following usage in kilowatt hours:

Month	2007	2008 (% increase)	2009 (% increase)
January		1,475	2,235 (52%)
February		1,508	1,960 (30%)
March		1,357	2,049 (51%)
April		1,594	
May		1,654	
June	1,615	2,055 (27%)	
July	1,536	2,746 (79%)	
August	1,554	3,036 (95%)	
September	1,323	3,051 (131%)	
October	1,009	1,638 (62%)	
November	941	1,860 (98%)	
December	1,645	2,200 (34%)	

The grow lights used to cultivate cannabis plants indoors consume large amounts of electricity. And analyzing the amount of electricity used can reveal valleys and peaks because the amount of light needed can change depending on the grow cycle.

142 plans, along with other evidence was found. Both Liem and Natalia Hoang were indicted under federal law, and moved to suppress. The motion was denied. They both took a conditional guilty plea and appealed.

ISSUE: May corroborated tips provided by an anonymous tipster be used in a warrant to support probable cause?

HOLDING: Yes

DISCUSSION: The Hoangs argued that the search warrant affidavit was not sufficient to show probable cause, but the court disagreed. The tips from the informant were specific and detailed and demonstrated the tipster's basis for their knowledge – he "saw" the marijuana. The officer corroborated significant parts of the story, as well, in particular that their electricity usage increased substantially, and showed peaks and valleys, which suggested the growing cycle of cannabis. (The Court also noted that comparisons to nearby houses were "of dubious relevance" because it did not demonstrate the size or population of those houses.)

The Court agreed they could not prove the veracity of the anonymous tipster but noted that was only one factor in the evaluation. It was also argued that the information was stale but they did not indicate a date or time frame for the tip. However, the Court noted that "the crime of marijuana growing is ongoing" and the Hoangs were well-established in their home. As such, their home was a "secure operational base." The Court agreed that there might be other reasons behind the electrical usage and a printout of a website, but it was enough to establish probable cause. Finally, the Court agreed that a comparison of electrical usages between houses could not be made but noted that the usage in the house alone, with its sharp increase, was sufficient.

The Court affirmed their plea.

U.S. v. Redden, 471 Fed.Appx. 492, 2012 WL 2149812 (6th Cir. 2012)

FACTS: Tennessee officers searched Redden's motel room pursuant to a warrant, looking for counterfeit money. The affidavit stated that during the previous 24 hours, the officer "had been working on a case involving the making of counterfeit money." Redden moved for suppression, arguing the warrant affidavit was not sufficient. The Court denied the motion. Redden took a conditional guilty plea and appealed.

ISSUE: May a reliable tipster provide sufficient information to support a warrant?

HOLDING: Yes

DISCUSSION: The Court noted that the affidavit, "while not a model of grammar," also stated that a citizen informant, who had been reliable in the past, had provided information. The Court agreed that while it could have been more explicit, it was sufficient and upheld the plea.

U.S. v. Westerlund, 2012 WL 1415382 (6th Cir. 2012)

FACTS: On March 25, 2009, B.J., age 15, came home intoxicated. He reported he'd gotten alcohol from Westerlund. J.P., B.J.'s girlfriend, also got liquor from Westerlund. She claimed that Westerlund took them to a particular place to buy it, which was corroborated by video. Chief Olney did an search warrant affidavit detailing the investigation, which included information that Westerlund had a sexual relationship with another of the juveniles. The affidavit also covered Westerlund's prior criminal history in which he'd had child pornography in his possession.

Oldney received the warrant and searched Westerlund's house, vehicle and workplace. He found marijuana, whiskey (as described by the juveniles), computers and photos of naked minors. Westerlund made incriminating admissions which were used to obtain an additional search warrant for electronic devices and for his sailboat.

Westerlund was indicted on federal sexual exploitation, child pornography and related charges. He moved for suppression, arguing that the officers lacked probable cause to search. The trial court agreed that the affidavit was not sufficient for a search for child pornography, but was sufficient to support a search for evidence of providing alcohol to the minors. It was also reasonable for them to look for cameras and photos, since one of the juveniles stated photos were taken. He took a conditional guilty plea and appealed.

ISSUE; Even if a search warrant is deemed insufficient for one charge, may be still uphold a search for other items?

HOLDING: Yes

DISCUSSION: The Court agreed that the search was appropriate as decided by the trial judge. Further, any statements he made following the search were admissible and were not the fruit of the poisonous tree. Finally, although he objected to the search of his workplace, the Court found that was a moot issue because nothing was found there.

The Court upheld the plea.

SEARCH & SEIZURE – WIRETAP WARRANT

U.S. v. Wolcott, 2012 WL 2086944 (6th Cir. 2012)

FACTS: In early 2008, the DEA, KSP and the Tennessee Bureau of Investigation (TBI) began an investigation of drug-trafficking, money-laundering, illegal-gambling and cockfighting in Kentucky and Tennessee. Three individuals, Wolcott, Copas and Glass were the focus. They worked to infiltrate the organization with CIs. The CIs viewed cockfights at the invitation of one of their associates, Ferguson, and bought marijuana. The investigators received pen register data from Ferguson's cell phone, which showed hundreds of calls to and from the trio. Two controlled buys were made, as well.

The DEA received a wiretap warrant for the phone, which described, as required, an explanation as to "why non-wiretap techniques were unlikely to succeed and thus why wiretap authority was necessary."[41] The tap was authorized for 30 days, and subsequently, additional taps were authorized for both Joseph and Kevin Wolcott. They searched Joseph's Wolcott's home in Tennessee and evidence was found. Prior to trial, however Joseph Wolcott requested suppression, arguing insufficient proof that electronic surveillance was necessary. He was convicted and appealed.

ISSUE: Must a wiretap warrant explain why other methods ware not feasible?

[41] 18 U.S.C. § 2518.

HOLDING: Yes

DISCUSSION: Under federal law, a wiretap request must include ""a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." It should only be the last resort when other more conventional investigative means are exhausted. However, it does not need to prove that other methods are impossible. In this case, although they were getting good information through the CI, it was with a "relatively low-level participant in the operation, Ferguson." The CI was limited to the role of buyer. The affidavit described other methods they had used, or considered using, to gain information. The Court noted that physical surveillance was difficult, if not impossible, because some of the residences could not be discovered, and others were in rural areas where it would be difficult to conduct surveillance without risking notice.

The court agreed that the wiretap authority was appropriate in this case.

SEARCH & SEIZURE - FLASHLIGHT

U.S. v. Harper, 2012 WL 2479592 (6th Cir. 2012)

FACTS: On May 20, 2009, at about midnight, Sgt. Kelly (Cleveland PD) was patrolling. He spotted a SUV sitting at a phone booth at a gas station known for drug activity. He followed the SUV, eventually seeing it drive without headlights and make an unsignaled turn. He made a traffic stop.

Sgt. Kelly could see there were four occupants and that they were moving around. He obtained the driver's OL and using his flashlight, saw a gun on the floor between the driver and the passenger (Harper). He had all occupants get out and searched the SUV. Harper admitted to owning the gun. Harper, who was a felon, was charged with possession of the gun. (The driver received a traffic ticket.) Harper moved for suppression, based upon the use of the flashlight. He was convicted and appealed.

ISSUE: May a flashlight be used to illuminate something in plain view?

HOLDING: Yes

DISCUSSION: Harper argued that the stop, while initially lawful, was "improperly expanded by Kelly's use of a flashlight." The Court noted that in Texas v. Brown, the court had ruled that "it is not unconstitutional for an officer to look inside a vehicle using a flashlight."[42] Further, it appeared that at the time Kelly glanced inside, the traffic stop was not yet concluded, as he had simply received the driver's OL at that point.

Harper's conviction was affirmed.

[42] 460 U.S. 730 (1983).

SEARCH & SEIZURE – DRUG DOG

U.S. v. Johnson, 2012 WL 1994765 (6th Cir. 2012)

FACTS: Johnson was stopped for speeding in Chattanooga, "but that was the least of his worries." During the stop, Officer Duggan wrote a warning ticket and asked for consent to search. He suspected criminal activity because Johnson was nervous, sweating, his hands were shaking and he stared intently. He also spotted degreaser in the vehicle, which was a rental, which he took as a sign that Johnson wanted to clean something up. He also noted that the rental contract only allowed the vehicle to be driving in Georgia and Florida, but obviously, he was stopped in Tennessee and admitted he was going to Kentucky. His stated travel plan, to visit a woman he knew but had not met, was highly suspicious. His records check indicated he had a violent history. They engaged in "chat," Johnson refused to consent and Duggan called for a drug dog, which arrived about 19 minutes later. Max, the dog, alerted on the car. "Clothed with power from the dog's alert," Officer Duggan searched, finding the gun, which had been stolen. (He did not find drugs.) Johnson, a felon, was indicted for possession of the gun. Johnson moved for suppression, arguing the stop was unlawfully extended. He was denied, which the judge finding reasonable suspicion to extend the stop. Johnson took a conditional guilty plea, and appealed.

ISSUE: May a traffic stop be extended on articulated suspicion of drug trafficking, if the indicators are weak?

HOLDING: No

DISCUSSION: The Court looked to the totality of the circumstances, and agreed that officers may "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person."[43] If they find reasonable suspicion, they "may extend a traffic stop long enough to confirm or dispel his suspicions."[44] The Court agreed that the officer "had no difficulty articulating his grounds for suspicion.," focusing on numerous "nervous indicators" and the unusual contents of the vehicle, including his lack of conventional luggage. The Court agreed, however, that the individual indicators were weak, although the officer "clearly believed that criminal activity was afoot." His story was inconsistent and he had a prior criminal history, but again, the link was "tenuous, at best."

The Court agreed that it was a close call, but that there was insufficient reasonable suspicion to justify holding him for the drug dog. The Court reversed the conviction and remanded the case.

[43] U.S. v. Shank, 543 F.3d 309 (6th Cir. 2008).
[44] U.S. v. Davis, 430 F.3d 345 (6th Cir. 2005).

U.S. v. Stubblefield, Earvin and Spigner, 682 F.3d 502 (6th Cir. 2012)

FACTS: In July, 2009, Officer Gerardi (Ohio agency) pulled over a vehicle, driven by Earvin, for speeding. Stubblefield and Spigner were passengers. Officer Gerardi had Arrow, his drug dog, go around the car. Arrow alerted. On a subsequent search, officers found $700 and a sealed envelope with an unknown name as designation. Inside, officers found 10 false Texas OLs, with Stubblefield or Spigner's photo, along with 20 bank checks payable to those false names.

All three were arrested and the vehicle was towed. The officers continued their search at that location and found additional IDs, checks and maps of places to cash the checks in the area. All three men were indicted and moved for suppression. When that was denied, they took a conditional plea and appealed.

ISSUE: May a drug dog be used when the stop is not unduly extended by its use?

HOLDING: Yes

DISCUSSION: Only Earvin and Spigner challenged the suppression. (Stubblefield appealed unrelated issues.) Earvin argued that the traffic stop was unreasonably extended by the use of the dog, that the dog's reliability was not established, that the alert did not justify opening the envelope, that his arrest was unlawful and that the towing and continued search is unreasonable.

Taking each in turn, the court noted that a drug dog may be utilized, even without reasonable suspicion, so long as the stop is lawful and "not improperly extended." The Court noted that the dog was with Gerardi. Gerardi wrote the citation and gave it to Officers Ours to explain, while he used the dog. Only minutes passed. As such, the use of Arrow was lawful. The Court also found more than sufficient evidence to uphold the trial court's decision that Arrow was properly trained and reliable, based upon extensive testimony and documents submitted by Gerardi. The crucial question is not that, as it turned out, there were no drugs in the car, but that it was reasonable for Gerardi to believe there were. Because the officers had probable cause, they were permitted to search the entire car, in any "container" where the contraband might be hidden. Gerardi testified that he suspected black tar heroin, which can be rolled out flat. As such, it was lawful to search the envelope.

With respect to the arrest, the Court found the items inside justified the arrest of all three men, as sufficient proof of a fraudulent check cashing scheme. With respect to the towing and later search, the Court agreed that under Chambers v. Maroney[45] it was proper to move a car to continue a lawful search. In this case, it was safer to remove the car from the freeway for a more detailed search.

[45] 399 U.S. 42 (1970).

The Court upheld Earvin's plea. Since Stubblefield raised precisely the same issues, the court upheld his plea as well.

SEARCH & SEIZURE – TRAFFIC STOP

U.S. v. Jones, 2012 WL 3890945 (6th Cir. 2012)

FACTS: On February 27, 2009, Jones was a passenger in a vehicle. Officer Jackson (Cleveland PD) believed the vehicle did not have a required license plate and made a traffic stop. As he approached, however, he realized there was a temporary tag in the rear window. Believing that the way the temporary tag was displayed violated the law, he continued the stop, asking for the driver's OL. The driver could not produce an OL (in fact, his license was suspended) so he was removed from the car. Officer Jackson arrested the driver and removed Jones and another passenger from the car. He searched the car, finding a firearm under the passenger seat. Jones admitted he owned the weapon. Because Jones was a convicted felon, he was arrested, and ultimately indicted. He moved for suppression, arguing that since the vehicle had a plate, the stop was unlawful. The Court denied the motion and Jones took a conditional guilty plea. He then appealed.

ISSUE: Must a traffic stop end when the reason for it dissipates?

HOLDING: Yes

DISCUSSION: Jones argued that although the initial stop was lawful, once the officer saw the plate, any reason to continue the stop was dissipated. The officer, however, believed that the placement of the plate, and the fact that he could not see it until he was only a foot or so away from it, and shining a flashlight on it, still violated the law. The Court looked to Ohio law and concluded that in fact, the placement of the plate was within the law. The officer conceded that he could clearly read the plate before he approached the driver. (The officer also apparently stated at some point that he believed fog could be an unlawful obstruction of the plate.)

As the officer had no objectively reasonable purpose in continuing the stop, the Court reversed the denial of the motion to suppress, remanding the case.

U.S. v. Williams, 2012 WL 1700454 (6th Cir. 2012)

FACTS: On June 11, 2009, Flint PD began surveillance to collect information in a shooting investigation. Officer Watson was watching a particular address and could see people coming and going. Two vehicles caught his attention as they both seemed to be traveling "together" – although the officer saw no interaction between the occupants. He conveyed that information to other officers, who followed both. One unit saw one of the vehicles, an Impala, stop in a parking lot and engage in a drug transaction. When the vehicle stopped at another location and the driver got out, an officer approached the driver and asked if he had a license. He did not. He and the vehicle were searched

and marijuana was found. The driver, fearing that the car would be taken, offered up information on a "vehicle that contained a gun." He described the other vehicle, a Cadillac, the other vehicle that they considered suspect. Ultimately, that informant was released, and the record was unclear as to why, and was also unclear as to whether the vehicle was towed.

The Cadillac was located at a gas station, and officers blocked it in to prevent it from leaving the scene. They approached and saw that a passenger was in possession of an "assault rifle." They ordered Williams, the driver, from the vehicle and saw a handgun between the front seats.

Williams was arrested. He moved for suppression, arguing there was insufficient cause to stop him. The Court agreed that the tip should be given little weight, as it didn't actually even amount to an allegation of an ongoing offense. The Impala's driver's motive made him suspect, as well. The Court granted the motion to suppression and the Government appealed.

ISSUE: Is a tip from a criminal suspect necessarily unreliable because it implicates another person?

HOLDING: No

DISCUSSION: The Government argued that the face-to-face nature of the informant, although not identified in the record and not apparently known to the officers prior to the stop, made it much more reliable. The Court noted that "when part of the reasonable-suspicion equation includes a tip from an informant, the weight to which that tip is entitled falls along a broad spectrum." Anonymous tips "are generally entitled to little weight because they provide slim, if any, opportunity to assess the reliability and credibility of the individual providing the information." Further, when the tip "fails to make any allegation of illegality," it is "likewise entitled to little weight." On the other hand, tips from "known or reliable informants are generally entitled to substantially more weight." In this case, the trial court "effectively relegated the informant's statement to that of an anonymous tipster." The Court looked to Henness v. Bagley[46] and noted that face-to-face informants provide officers with the opportunity to "observe the informant's demeanor and credibility," even if otherwise anonymous or unverified. The fact that the officers can hold the informant accountable also adds to their credibility. In this case, the informant was "handcuffed in the back of the patrol car – albeit temporarily" and thus "faced the real risk of repercussions if the information he provided proved false." He also knew that the tip could be "quickly confirmed or dispelled." His motive, to keep his car from being towed, if anything added to the likelihood that he would provide good information. Finally, his "recent and close proximity" to the other car suggested that his information was reliable.

The Court reversed the suppression and remanded the case.

[46] 644 F.3d 308 (6th Cir. 2011).

The Court also noted that Michigan law prohibited the carrying of a handgun in a vehicle without a license, and that the burden of establishing a license is on the person with the gun. The Court agreed that a sufficient argument was made that the driver may have been violating the law.

The Court reversed the suppression and remanded the case.

U.S. v. Lurry, 2012 WL 2337329 (6th Cir. 2012)

FACTS: On August 12, 2009, Officers Williams and Hazelrig (Memphis PD) made a traffic stop after an "automatic license plate reader" indicated the owner or occupant may have a warrant. The driver (Lurry) was "moving around a lot." Officer Williams hurried up and told him to quit moving around. Lurry admitted his license was suspended. Officer Williams frisked Lurry and spotted a bag of shotgun shells on the back seat. Lurry was placed in the cruiser back seat, but not handcuffed.

Officer Hazelrig did a records check while Officer Williams searched the car. He found a sawed-off shotgun in the passenger compartment and returned to the car to make the arrest. After a struggle, Lurry was actually arrested. As he was a felon, he was charged with possession of the handgun. He requested suppression. The Court upheld the search because the officers saw the shells in plain view. Lurry took a conditional guilty plea and appealed.

ISSUE: May a vehicle be "frisked" for weapons if ammunition is spotted?

HOLDING: Yes

DISCUSSION: The Court ruled that the plain view exception did not apply "because the incriminating nature of the shotgun shells was not immediately apparent." The officers began the search before they learned of his status as a convicted felon and shotgun shells are normally legal to possess. However, the court found it to be a "permissible protective search" under Michigan v. Long.[47] Since Lurry was not actually secured at the time, although he was in the cruiser, the Court agreed that he might reenter the vehicle. Officer Williams had reason to believe there was a weapon in the vehicle. The Court ruled that Gant did not apply because he was not under arrest at the time.

The Court upheld the decision to deny the suppression.

U.S. v. Cathey, 2012 WL 230276 (6th Cir. 2012)

FACTS: On October 14, 2008, Det. Miller (KSP) spotted Cathey parked outside the Fulton County Courthouse. He recognized Cathey from previous investigations. He watched as Cathey appeared to be working on the vehicle, opening both the trunk and the hood. He then entered the courthouse. Det. Miller checked the license plate and

[47] 463 U.S. 1032 (1983).

discovered it was not for the vehicle. He waited until Cathey came out and drove away, and stopped him for the plate and careless driving after Cathey almost caused a collision.

Cathey produced his OL but had no proof of insurance or registration. He found him "nervous and fidgety," his speech slurred and he was sweating. The trooper did a limited FST as Cathey claimed an injury. He then asked for consent to search the vehicle, which Cathey gave. Det. Miller searched inside, finding nothing and then asked if he could open the trunk. Cathey agreed. Inside a soft drink pack, Det. Miller found methamphetamine and pills. On Cathey's person, he found cash and a few pills. Inside the hood, he found methamphetamine and over $13,000 in cash.

Cathey was arrested. He moved for suppression of the evidence, which was denied. At trial, he testified he'd borrowed the vehicle but the supposed owner (from whom he claimed to have borrowed the car) did not appear to testify. The actual registered owner did appear but gave conflicting testimony. Cathey was convicted and appealed.

ISSUE: Does asking for consent turn a traffic stop into an investigation?

HOLDING: No

DISCUSSION: Cathey did not dispute the initial interaction, but argued that once he was asked for consent to search the trunk, it became an investigation and extended the duration of the traffic stop. The Court agreed that in order to extend the stop, "Miller must have had a reasonable and articulable suspicion that criminal activity was afoot." However, officers may always ask for consent. At the time Det. Miller asked for consent, "Cathey had not yet satisfactorily explained the ownership of the car or the wrongfully displayed license plate." He had also admitted to having taken hydrocodone and was possibly impaired.

The Court ruled the extension of the stop was proper. Once Det. Miller found the contraband, the search of the engine compartment was justified under the automobile exception.[48] The Court further agreed that Cathey was in constructive possession of all of the drugs and cash found inside the car.

The Court upheld Cathey's conviction.

U.S. v. Terrell, 2012 WL 1994749 (6th Cir. 2012)

FACTS: On May 28, 2009, Officer McCoy (Amherst, OH, PD) was on patrol when he noticed a vehicle with heavily tinted windows. He had been trained to evaluate tint and believe it to be in violation of a local ordinance. He followed the vehicle and observed several "lane violations." When Officer McCoy stopped the vehicle and approached, he found several clues that suggested the vehicle was going used to courier drugs, as he could smell "raw marijuana" and there were several air fresheners

[48] U.S. v. Smith, 510 F.3d 641 (6th Cir. 2007); U.S. v. Lumpkin, 159 F.3d 983 (6th Cir. 1998).

and cell phones visible in the car. He discovered Terrell, the driver, had two active warrants and his OL was suspended. He told Terrell what he had and asked about weapons – Terrell admitted there was a handgun in the vehicle. He also conceded there was marijuana inside the vehicle. McCoy learned there was also a warrant on the passenger, Terrell's daughter. Both were arrested and McCoy did a "probable cause search" of the car, finding the pistol. The vehicle was towed to the police station, where a drug dog alerted – 31 pounds of marijuana was found.

Terrell was charged and he moved for suppression. When the motion was denied, he took a conditional guilty plea and appealed.

ISSUE: May a traffic stop be made on a pretext?

HOLDING: Yes

DISCUSSION: Terrell first argued that the initial stop was improper as it was pretextual. (Specifically, he argued that the officer could not have noticed the tint as it was twilight.) The Court found no reason to doubt the officer's testimony however, and ruled it a proper Whren[49] stop. Once he smelled the raw marijuana, he had probable cause to search the vehicle.[50]

The Court upheld the search and Terrell's plea.

U.S. v. Lyons, 2012 WL 2044411 (6th Cir. 2012)

FACTS: On May 8, 2009, Northern Ohio Violent Fugitive Task Force had three outstanding arrest warrants on Lyons. They sought him at Dawkins' home as Lyons had been arrested there previously. No one answered their knock so they tried the door handle, at which point Dawkins "yelled at the officers, asking who was there." They responded and after a few minutes, Dawkins answered the door. She initially denied Lyons was there but finally admitted it, allowed them to search. They found Lyons "hiding under a mattress and box spring." They spotted a box of ammunition partially hidden by a couch cushion, and an officer "nudged the cushion with his foot to get a better view." The nudge revealed a loaded handgun, as well.

As Lyons was a convicted felon, he was charged with possession of the weapon. He moved for suppression and was denied. He was convicted at trial and appealed.

ISSUE: Is ammunition in the residence of a convicted felon "immediately incriminating?

HOLDING: Yes

[49] Whren v. U.S., 517 U.S. 806 (1996).
[50] U.S. v. Foster, 376 F.3d 577 (6th Cir. 2004); U.S. v. Garza, 10 F.3d 1241 (6th Cir. 1993).

DISCUSSION: The Court agreed that the ammunition and the handgun were in plain view. The officers were lawfully in the apartment, with Dawkins' permission. Because they knew Lyons was a felon, the box of ammunition was immediately incriminating. (The Court apparently accepted the moving of the cushion as acceptable based upon the need to seize the ammunition.)

Lyons' conviction was affirmed.

U.S. v. Rodriguez, 2012 WL 2105286 (6th Cir. 2012)

FACTS: On December 1, 2009, Trooper Diggs (Michigan State Police) was monitoring traffic on I-94. Rodriguez drove by but when he noticed the cruiser, he tried to hide behind the door post. Diggs followed and eventually stopped Rodriguez for following too closely. Rodriguez told him he was going to a bachelor party but did not know the date of the wedding. Diggs checked his paperwork as Rodriguez sat in the back of the car, and then returned it, telling him he was "good to go." He then began to ask Rodriguez about travel plans, his arrest record and if there was anything illegal in the vehicle. Riggs gave consent to search after about four minutes. Heroin (2 kilos) and Cocaine (10 kilos) were recovered from a hidden compartment.

Rodriguez was indicted. He moved for suppression, arguing the stop was invalid, or in the alternative, that his continued detention was improper. He was denied, and took a conditional guilty plea. He then appealed.

ISSUE: Is asking questions following a traffic stop proper?

HOLDING: Yes (but see discussion)

DISCUSSION: Rodriguez argued that the traffic stop was improper, but the Court found the trooper's testimony "highly credible" with respect to the traffic infraction. Even if Diggs had an "ulterior motive," that is irrelevant. The Court agreed that once a traffic stop is completed, that he could not be further detained, but also held that "a police officer does not violate the Fourth Amendment by asking an individual questions after the initial traffic stop has ended."[51] In this case, they were alone, and Diggs remained "relaxed, polite, and respectful." Asking questions does not make this a seizure. However, the Court agreed, "Rodriguez was seated in the back of the police cruiser," but that was apparently because of weather. As such, "there was no need for Diggs to have reasonable and articulable suspicion to ask additional questions after the purpose of the traffic stop was complete." The Court further noted that, in fact, the trooper did have reasonable suspicion to extend the stop, listing the factors above.

The Court upheld the plea.

[51] U.S. v. Branch, 537 F.3d 582, (6th Cir. 2008) (citing U.S. v. Erwin, 155 F.3d 818 (1998).

U.S. v. Redmond (Michael and Casey) 475 Fed.Appx. 603, 2012 WL 1237787 (6th Cir. 2012).

FACTS: In December, 2007, Officer Whitaker (Lake Cumberland, KY, Area Drug Task Force) went to Michael Redmond's home to investigate him on trying to steal lithium batteries. He found Casey, there, Michael's son, but Casey claimed to be another son, Cornelius. Casey admitted that he knew Michael was producing methamphetamine and to buying pseudoephedrine for Michael to use for that purpose. He also implicated other family members. Whitaker smelled a strong chemical odor and seized a small amount of methamphetamine and marijuana.

Several months later, Gilbert, another TF member, received a call about a subject buying 2 canisters of lye. The subject had iodine-colored fingers and was driving an identified vehicle. The officer discovered that the subject was driving a vehicle registered to Michael Redmond. Gilbert knew that Redmond had been under investigation and he went after the vehicle. He caught up with the subject (Nannette, Redmond's wife) driving it at Redmond's home, and asked for consent to search the truck. Michael was present and also refused consent. Gilbert called for assistance and two Pulaski County SO deputies arrived. The deputies swept the house, finding no one, and stood by to supervise Redmond and Nannette. Gilbert peered through the truck window and spotted what he thought was a starting fluid can. Gilbert opened the door and found starting fluid, ether and what he thought was iodine. He arrested Nannette and asked her about the lye – finding it where she indicated. She admitted that the chemicals were to be used to "cook."

Using this information, Whitaker got a search warrant and a number of items were found during the subsequent search. As a result, Michael, Casey and Nannette Redmond were all charged. The Court upheld the vehicle search under the automobile exception (Carroll). The Court also noted that because the suspects did not argue that the warrant failed to provide probable cause, that search was also upheld.

Both Michael and Casey Redmond were convicted. Both appealed, but Casey only appealed the sentence.

ISSUE: Are facts automatically stale because of the passage of time?

HOLDING: No

DISCUSSION: Michael argued "that the collective knowledge of the law enforcement officers did not establish probable cause to conduct the warrantless search of the vehicle because many of the facts supporting probable cause were either stale or were based on uncorroborated information from an unreliable informant." The Court reviewed the evidence available, some of which had occurred some time in the past. The Court agreed that "facts that at one time supported probable cause can over time become stale where they are not 'so closely related to the time of the [search] as to

justify a finding of probable cause at that time.'"[52] However, the Court noted that the "passage of time is less significant when the crime at issue is ongoing or continuous and the place to be searched is a secure operational base for the crime." In addition, "information from an informant that is otherwise stale may be refreshed if the affidavit contains recent information that corroborates otherwise stale information."[53] In this case, rather than simply selling drugs, the Redmonds were involved in a long-term drug operation. The Court noted that manufacturing methamphetamine fell in between growing marijuana and simply selling or consuming drugs, and left behind evidence, as well. The "alleged criminals were entrenched rather than nomadic." There was no evidence that the lab was mobile. The vehicle was searched at the location, where it had been driven.

In addition, Casey and Ami (his friend) had clear basis for this information, as they lived in the house and assisted him in procuring ingredients.

The Court upheld both searches.

SEARCH & SEIZURE – INVENTORY

U.S. v. Jackson, 682 F.3d 448 (6th Cir. 2012)

FACTS: On August 27, 2010, Akron, OH, PD officers were given a BOLO for a shooting suspect. The vehicle was described in detail. Officer Meech was familiar with the suspect and spotted the vehicle. He turned to follow and tried to read a temporary tag, but the vehicle swung into a driveway. As the driver did not use a turn signal, Meech initiated a traffic stop.

Jackson, the driver, opened the door. Officer Meech saw that both Jackson and Gay, the passenger, were drinking. Jackson agreed he did not have an OL. Meech realized quickly, however, that the vehicle was not the suspect vehicle, although it was very similar. Jackson was arrested and was also discovered to have an outstanding warrant. Gay had a suspended OL.

Because neither could lawfully drive the vehicle, Meech towed it pursuant to APD policy Meech did an inventory before the vehicle was towed. He found a pistol under the floor carpet. Because Jackson was a convicted felon, he was also charged with possession of the gun. He moved for suppression, which was denied. He then took a conditional guilty plea and appealed.

ISSUE: May a vehicle be searched pursuant to an agency's inventory policy?

HOLDING: Yes

[52] U.S. v. Hython, 443 F.3d 480 (6th Cir. 2006).
[53] U.S. v. Thomas, 605 F.3d 300 (6th Cir. 2010).

DISCUSSION: Jackson argued that the officer did not have to tow the vehicle (and thus search it) but instead, could have left it where it was, on private property, simply by asking the property owner. (There is no indication Jackson had any connection with the property.) The Court found no reason to believe that the officer had any improper motive in electing to tow it, however, and upheld the inventory. Further, the Court agreed that lifting the carpet, which already appeared "torn up" was justified.

Jackson's plea was upheld.

42 U.S.C. §1983 - ADA

Burnett v. Sault Ste. Marie Police Department, 469 Fed.Appx. 463, 2012 WL 1522768 (6th Cir. 2012).

FACTS: Burnett visited a university library to use the Internet. An officer looked at his camera (apparently with consent) and then seized it. He stated Burnett had been banned from the library and ordered Burnett to come to the station with him, but the vehicle was not handicapped accessible. Burnett claimed that the transport "caused him excruciating pain and injury" and filed a lawsuit under ADA. The trial court dismissed the case and Burnett appealed.

ISSUE: Does transporting a handicapped subject automatically trigger the ADA?

HOLDING: No

DISCUSSION: The Court noted that to argue intentional discrimination under the ADA, Burnett must show that (1) he has a disability, (2) he otherwise qualified for the service involved; (3) he was being denied a benefit because of his disability and (4) the discrimination was intentionally directed towards him."[54] In this case, the Court noted that Burnett failed to explain the deficiencies he alleged in the vehicle or how they could be remedied. He did not allege even that he made the officer aware of the problem so that he could be accommodated.

The Court upheld the dismissal of the ADA claim.

42 U.S.C. §1983 - HECK

Noel v. Guerrero, 2012 WL 1522870 (6th Cir. 2012)

FACTS: Noel was under investigation from the BAYAYET narcotics team, in the Saginaw, MI, area. His property was searched three times, with the first two yielding evidence used against him in federal prosecutions. He asked to have claims bifurcated (tried separately) so that he could pursue civil claims related to the lawsuit prior to the

[54] Tucker v. Tennessee, 539 F.3d 526 (6th Cir. 2008).

resolution of the criminal claims to avoid the Heck v. Humphrey[55] bar. The Court refused to hold the case in abeyance, however, and he was convicted. He filed suit, but the case was dismissed. He then appealed.

ISSUE: Does the Heck bar require dismissal of a lawsuit that would challenge the underlying conviction for a crime?

HOLDING: Yes

DISCUSSION: Under the Heck bar, a lawsuit cannot go forward if it challenges the validity of the underlying conviction. The Court ruled that the District Court properly dismissed the civil case without prejudice, and that Noel could refile if he is able to successfully challenge his convictions.

42 U.S.C. §1983 - ARREST

Halasah v. City of Kirtland, 2012 WL 2366231 (6th Cir. 2012)

FACTS: On May 23, 2009, Halasah was called to the Kirtland (OH) PD to get his underage son. The boy had been taken into custody from a party and was suspected of drinking and trespassing. Halasah asked that his son be given a breath test, which the officers refused. Officer Fisher later stated that Halsash "behaved in a disruptive manner." He was told to leave or he would be arrested, and he did so.

Officer Fisher forwarded his report to the prosecutor, who concluded Halasah should be charged with disorderly conduct. The officer prepared a criminal complaint and a warrant was issued. Halasah was arrested and released. The charges were reduced and ultimately, Halasah stood trial and was acquitted.

Halasah filed suit against Officer Fisher and the City of Kirtland under 42 U.S.C. §1983. The defendants requested summary judgment, which was granted. Halasah appealed.

ISSUE: Does an arrest require proof on every element of a charge?

HOLDING: Yes

DISCUSSION: The Court noted that the only real issue was the claim against Officer Fisher. The Court noted that to succeed, Halasah would have to show that the officer "knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that created a falsehood …." The Court looked to the officer's complaint and noted it was silent on an essential element of the charge in Ohio, and in fact, his later testimony at trial was also silent on that issue. Further, there was a question as to the accuracy of the officer's claim that he had to repeatedly ask Halasah to leave.

[55] 512 U.S. 477 (1994).

The Court upheld the summary judgment in favor of the police chief and the city, but reversed it with respect to Officer Fisher.

42 U.S.C. 1983 - RELEASE AGREEMENTS

Marshall (David / Chandra) v. City of Farmington Hills, 2012 WL 1522699 (6th Cir. 2012).

FACTS: On December 13, 2006, Officer Marshall (Detroit PD) was off duty and on his way home. He was pulled over by Officer Meister (Farmington Hills PD) on a traffic stop. Officer Meister ordered Officer Marshall to remove his service weapon and he refused. Officer Jarrett Tased Marshall three times, removed the weapon and arrested Marshall for "obstructing law enforcement." Marshall was separately charged with child abuse in an unrelated incident and was acquitted of that offense. Marshall entered into a conditional release-dismissal in exchange for Marshall not filing suit against Farmington Hills, subject to two conditions to be negotiated. However, they were never able to reach agreement on the conditions and as such, Marshall considered the release unenforceable. He demanded a trial on the obstruction charge. The Court refused that, however, finding the release valid and binding.

Marshall and his wife filed suit under 42 U.S.C. §1983, alleging false arrest and related claims. The trial court found the release barred the lawsuit and dismissed. The Marshalls appealed.

ISSUE: Must a case be resolved by a written order (rather than verbal)?

HOLDING: Yes

DISCUSSION: The Marshalls argued that the underlying case was never fully litigated to a final determination because the trial court did not render a written order. The Court agreed and noted that to hold otherwise would prevent the Marshalls from arguing issues of misconduct. The Court reversed the dismissal.

42 U.S.C. 1983 - BRADY

Westerfield v. U.S. and Lucas / Metcalf, 2012 WL 2086847 (6th Cir. 2012)

FACTS: Westerfield was tried for possession of crack cocaine in Ohio. Det. Metcalf (Richland County SO) testified about the search warrant which resulted in the seizure of the cocaine. At the time, however, Metcalf had "given perjurious testimony against" one of Westerfield's co-defendants, but Westerfield was not provided that information. Both Lucas (a DEA agent) and Metcalf were aware of the falsity of the testimony.

When the issue was revealed, the Government agreed to vacate Westerfield's conviction. Westerfield filed suit against both Lucas and Metcalf, under 42 U.S.C. §1983. The two requested qualified immunity which the trial court denied. They took an interlocutory appeal.

ISSUE: Does Brady apply to individual law enforcement officers, as well as the prosecution?

HOLDING: Yes

DISCUSSION: Westerfield contended that his rights under Brady v. Maryland[56] were violated when they failed to disclose the issues with Metcalf's testimony. Had Metcalf been impeached, the prosecution would have lost critical evidence. The Court looked to Beuke v. Houk[57] and agreed that the evidence was material. Further, the Court agreed that Brady applies "with equal force to individual law enforcement officers."[58]

The officers further claim that Westerfield "was not subjected to even a single day of wrongful incarceration" because he was imprisoned on a separate charge at the time. The Court agreed, however, that was not an issue in a civil rights claim for denial of a fair trial.

The Court upheld the denial of a fair trial.

42 U.S.C. 1983 - USE OF FORCE

Caie v. West Bloomfield Township (Michigan) 2012 WL 2301648 (6th Cir. 2012)

FACTS: On August 2, 2009, West Bloomfield PD responded to a welfare check on Caie, age 19, who was "depressed, intoxicated and suicidal." He had attempted suicide in the past. He had drunk three bottles of wine and had snorted Paxil. He called his brother, Scott, and told him he was going to row out into the lake and drown himself.

Scott and Brandon (a friend) were able to calm Caie, initially. Scott and their father stayed with him, but Caie was able to escape through a window. They called the police for help. Officer Daily and Sgt. Tilli arrived. They found Scott and his father in a paddle boat on the lake, along with an empty rowboat. They called that Caie's cell phone and shoes were in the boat. Officer Dailey spotted someone in the water and called for the person to come to her. Caie was uncooperative, at one point, musing aloud whether he should fight so that the officers would have a reason to kill him. He did eventually emerge, however, but continued to "behave erratically." Officer Koziarski and the fire department arrived, but Caie would still not calm down or go voluntarily with the EMS crew. Sgt. Tilli signaled that they would have to take him into custody to be

[56] 373 U.S. 83 (1963)
[57] 537 F.3d 618 (6th Cir. 2008).
[58] Elkins v. Summit County, Ohio, 615 F.3d 671 (6th Cir. 2010).

transported. Sgt. Tilli unholstered his Taser and fired when Caie ran, but he missed him. Officer tackled Caie, but could not get his arms out for handcuffing. Sgt. Tilli then used his Taser in drive-stun mode and Caie was subdued and transported.

Caie filed sued under 42 U.S.C. §1983, arguing that excessive force was used against him. Ultimately, his entire claim was dismissed and he appealed.

ISSUE: May a Taser be used on an actively-resisting mentally ill subject?

HOLDING: Yes

DISCUSSION: The Court noted that the reasonableness of a use of force could only be judged from the officers' perspectives at the scene. The Court agreed that using a Taser on a non-resistant person was unreasonable, but in this case, Caie was still actively resisting apprehension. He was not compliant with their attempt to put him into custody, and he was intoxicated, suicidal, threatening, volatile, unstable and uncooperative. He was actively attempting to provoke the officers into using deadly force. Even though in this case they were not attempting arrest, Caie was a threat to the safety of the officers and others. The single use of the Taser in drive stun served the purpose of getting him into control.

The Court upheld the dismissal of the case.

Dixon v. County of Roscommon, 2012 WL 1522320 (6th Cir. 2012)

FACTS: On December 21, 2007, Dixon broke down in a borrowed van. He stopped in front of a driveway, prompting a call to law enforcement. Deputies Quintana and Kory (Roscommon County, MI, SO) arrived. Dixon could not provide ID and appeared to be under the influence of drugs. He said he was with the van's owner, Dean, who was not present, however. He provided a false name, for someone who turned out to have a suspended OL. Sgt. Tatrai and Deputy Smith arrived. Dixon was told to get out, but instead, he rolled up the window and locked the doors. He began smoking a marijuana pipe. The deputies broke the window with a flashlight, "hit Dixon on the back of the head, pulled him through the broken window, forced him to the ground, and placed him in handcuffs." He was charged and eventually pleaded to resisting and operating on a suspended OL.

Dixon then filed suit under 42 U.S.C. §1983, for excessive force and related state claims. He claimed that in addition to the above, he was "kneed" in the face and choked. The District Court found most of the force reasonable and supported by video, but ruled that there was an issue with the alleged choking, "which appeared to have occurred after Dixon had been subdued." The deputies appealed that ruling.

ISSUE: Must a disputed claim go forward in a §1983 lawsuit?

HOLDING: Yes

DISCUSSION: The deputies argued that Dixon failed to show an issue "because the video recording does not support his allegations that he was choked and that, at the time that he [claimed] he was choked, he was not putting forth any resistance." The Court agreed, however, that the video "neither proves or disproves" that claim.

The Court upheld the trial court's decision.

Landis v. Galarneau, 2012 WL 2044406 (6th Cir. 2012)

FACTS: On November 25, 2004, Michigan State Police troopers responded to a vehicle blocking a major road. They found Keiser trying to get into another vehicle and ordered him to stop. However, he fled and eventually Trooper Cardoza tackled him. Trooper Galarneau arrived and tried to assist, but Keiser tried to choke him. Garlarneau used OC spray and Keiser released him, then walking into the woods. The troopers, along with two deputy sheriffs, followed him into a swampy area. He did not comply with orders to come out of the water and they tried to Tase him, but his coat was too heavy. They entered the water, using a Taser and a baton on him. "In the melee, Keiser fell or was forced down into the water." Deputy Lynch pulled him out of the water and once he was handcuffed, he was brought to land. However, he was found to be deceased, having drowned.

Landis (Keiser's estate representative) filed suit under the troopers, the deputies and Livingston County. Most settled out, but Galarneau went to trial. The jury ruled in Galarneau's favor. Landis appealed.

ISSUE: May an officer be found liable for an injury they did not commit and could not prevent?

HOLDING: No

DISCUSSION: Landis argued that Galarneau could be liable for the actions of the other officers and that it was not necessary to find specific fault upon him. The Court agreed that sometimes, an officer might to liable for the actions of another officer, but that "mere participation in an event" is not sufficient. To be successful, Landis would have to prove that "Galarneau himself violated the Constitution by asking another officer to use excessive force or by failing to stop him from doing so." It was pointed out at trial that no one was accused of deliberately holding Keiser's head under the water.

The Court address a number of problematical statements made by Galarneau's defense attorney, but ultimately ruled in favor of upholding the verdict in the trooper's favor.

McColman v. St. Clair County, 2012 WL 1237845 (6th Cir. 2012)

FACTS: McColman is a double amputee, below the knees, who uses prosthetics. On August 28, 2008, she was stopped for drunk driving. A week before, she had been

involved in a domestic altercation with her husband in which she set a small fire and struck him with a prosthetic.

Deputy Doan spotted McColman weaving in her vehicle and pulled her over. She failed one of the FSTs and was given a PBT, which registered .18. She claimed at that time, she was handcuffed too tightly. He put her in the car and told her to scoot over, but she said she could not because she needed her hands to do so. He then went to the other side and "yanked" her across the seat, causing pain. One of her prosthetic limbs fell off but he replaced it. He left her sitting sideways and during the transport, she allegedly fell over and struck her head. Doan stopped and found her unresponsive, so he took her to the hospital. There she was allegedly left alone and fell from the gurney as she lost her balance due to the slippage from her prosthetics. Despite her complaints of pain from her head and wrists, she was cleared to go to jail.

Following her release, McColman filed suit under 42 U.S.C. §1983, alleging excessive force. Doan moved for dismissal, and the trial court agreed that McColman never actually made an excessive force claim related to the handcuffing, and that the other assertions were unfounded. The Court dismissed all claims against Doan and McColman appealed.

ISSUE: Must a claim be specifically raised in order to be litigated?

HOLDING: Yes

DISCUSSION: The Court agreed that McColman's pleadings did not cover the handcuffing claim and upheld the dismissal of those assertions. With respect to pulling her across the seat, the Court noted that Doan's previous experience with McColman indicated he knew of her aggressiveness and he had to use some force simply to get her into the vehicle, even though it did cause some bruising. The position she was seated in the vehicle was also reasonable, given her disability, and she did not apparently tell Doan she was "unstable" in that position. At best, he was negligent, but not grossly negligent, in doing so. Doan had asked another officer to supervise her at the hospital and that officer apparently failed to do so, but that could not be anticipated by Doan. (The Court also noted that she apparently fell because she was trying to avoid having a prosthetic slip off, so she was, in fact, the proximate cause of her fall.)

The Court upheld the dismissal.

Smith v. City of Akron, 476 Fed.Appx. 67, 2012 WL 1139003 (6th Cir. 2012)

FACTS: On August 27, 2007, Officers Ross and Miles (Akron, OH, PD) began to follow Smith, who was driving a stolen car. Smith stopped, got out and began to talk to the officers, telling them that the vehicle belonged to an unnamed friend. He was arrested. During the arrest, both agreed that Miles "wrestled Smith to the ground, punched and kicked him in his back, sprayed him with chemical spray and tased him."

However, Smith argued that he was cooperative during the arrest, which the police disputed.

Smith filed suit in state court, the city removed it to federal court. However, he initially did not name the officers, only listing "John Does." They were not officially added until some time after the two year statute of limitations had passed. The officers objected, and the District Court agreed, finding that the amendment was untimely. The Court granted summary judgment and Smith appealed.

ISSUE: Must officers be named in a timely fashion in a lawsuit, if they are not initially identified?

HOLDING: Yes

DISCUSSION: Smith argued that the addition of the officers "related back to his original complaint" under the federal rules. He claimed that since Ross and Miles knew about the lawsuit, they were not prejudiced by being added after the two year statute of limitations. The Court noted that he did not make a mistake in the parties, he simply claimed that he did not know who they were and thus could not name them initially. The Court noted that it is proper for defendants to be named as John Doe and then added latter. (The Court also noted that he waited until the last day possible to even file the lawsuit.)

Further, the Court agreed nothing that was alleged implicated the city in any liability and upheld the dismissal of the case.

Hermiz v. City of Southfield, 2012 WL 1816230 (6th Cir. 2012)

FACTS: On September 27, 2007, Officer Matatail made a traffic stop of Hermiz. His video camera showed no indication of erratic driving or speeding, however. Hermiz pulled into a parking lot, followed by the officer.. Apparently, Hermiz then slowly pulled out of the lot and Matatail then fired four shots into the car, hitting Hermiz. He died at the hospital.

Hermiz's estate filed suit, under 41 U.S.C. §1983. The City and Matatall requested summary judgment and were denied. They filed an interlocutory appeal.

ISSUE: May an officer continue to fire at a vehicle, when it poses no threat?

HOLDING: No

DISCUSSION: The court agreed that "an officer may shoot at a driver that appears to pose an immediate threat to the officer's safety or the safety of others."[59] However, they cannot continue to fire "once the car moves away, leaving the officer and

[59] Brousseau v. Haugen, 542 U.S. 194 (2004).

bystanders in a position of safety"[60] … "unless the officer's prior interactions with the driver suggest that the driver with continue to endanger others with his car."[61] The Court agreed that the jury could reasonably infer that at least some of the shots, and certainly the last one, was fired when Matatall could not reasonably believe he was in danger from the car. Further, the Court had already ruled that the law was clearly established that it was unreasonable to shoot at a driver that no longer poses a threat.[62]

Although the Court agreed that Matatall might be able convince a jury that the shooting was appropriate, by proving "whether an officer had sufficient time to perceive, at the time of the last shot through the driver's-side window, that the passing car no longer presents an immediate threat." At this point, the Court could only address the "legal question" and agreed that the Fourth Amendment prohibited shooting.

The Court upheld the denial of summary judgment.

Simmonds v. Genesee County, 682 F.3d 438 (6th Cir. 2012)

FACTS: On November 23, 2007, Genesee County law enforcement received 911 calls concerning Simmonds' "threatening behavior. His father reported that SImmonds had threatened to kill the Careys, his ex-girlfriend's parents. Troopers Kaiser and Dirkse (Michigan State Police) responded, along with officers from Richfield Township and Genessee County Sheriff's Office. Some went to the Simmonds' home, and others to the Carey residence. After learning that Simmonds was not at the Carey home, most of the officers there left for the Simmonds' home.

There, they formulated a plan to capture Simmonds, understanding him to be in a heavily-wooded area of the property. His father explained Simmonds' mental state and that he was drinking and possibly suicidal. As they were implementing the plan, however, Simmonds drove up a private road from the woods toward the cruisers. The officers turned on their emergency lights and ordered him to get out with his hands raised. Instead, he backed his vehicle into the wooded area. Officers and deputies pursued him. Simmonds' truck became stuck in snow and five of the officers approached him on foot, still ordering him to submit. Deputy Stone opened the truck door and deployed his Taser. He believed the Taser had worked, but in fact, Simmonds leaned over intentionally, faking a reaction. (His heavy jacket protected him from the probes.)

Simmonds arose, yelled that he had a firearm and turned toward the officers "with his hands extended in a firing position." Although the details differed, several officers were consistent in reporting a "silver object" in his hands. Deputy Comstock "did not hesitate and immediately fired several shots." Trooper Dirkse also fired. The officers attempted aid, but Simmonds died. Following his removal from the vehicle, "they found

[60] Kirby v. Duva, 530 F.3d 475 (6th Cir. 2008).
[61] Smith v. Freland 954 F.2d 343 (6th Cir. 1992); Walker v. Davis, 649 F.3d 502 (6th Cir. 2011).
[62] Sigley *v. City of Parma Heights,* 437 F.3d 527 (6th Cir.2006).

a silver and blue cell phone with the antenna extended" on the front seat. They also found a .22 caliber rifle in the snow near the truck.

Video caught part of the events. Notably, because of the way the cruiser was parked, however, the view was partially obstructed of the scene. In addition, there was music playing inside the cruiser, so "the video could not capture any audible statements from either the officers or [Simmonds] – only the gunshots."

Simmonds' father (as the representative of his estate) filed suit under 42 U.S.C. §1983, alleging a number of issues. All officers moved for qualified immunity and summary judgment. The officers were deposed and they renewed their motions. The Estate objected, noting certain "factual discrepancies" in the officers' deposition testimony. The depositions related to testimony between Dirkse and Comstock "concerning where Kevin pointed the alleged weapon." Further, Comstock testified that Simmonds had "brandished the weapon through the open driver's side window whereas Dirkse stated that it was through the open driver's side door."

The District Court agreed with the officers that "neither discrepancy involved a genuine issue of material fact, " having "no bearing on the officers' entitlement to qualified immunity, as these facts did not alter the reasonableness and permissibility of the officers' use of force." Simmonds appealed with respect only to Comstock and Dirkse.

ISSUE: Do minor discrepancies require dismissal of a qualified immunity motion?

HOLDING: No

DISCUSSION: The Court reviewed whether the Estate had presented "evidence sufficient to create a genuine issue as to whether the defendant committed the acts that violated the law."[63] In this case, the Court agreed that the Estate did not, agreeing with the trial court that the two discrepancies identified did not demonstrate that the shooting violated Simmonds constitutional rights. The Court agreed that the shooting was objectively reasonable and that the analysis of such "contains a built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances."[64] The Court reviewed the undisputed facts noting that Simmonds rested his case on inconsistent and illogical facts, suggesting, for example, that since Simmonds' alleged assertion that he had a gun could not be heard on the recording, he did not say it. In fact, the Court agreed, there were "absolutely no audible statements" during the relevant time. The Court noted that to accept the Estate's claim, the Court "would have to reasonably infer that this group of police officers approached Simmonds and, without warning or hesitation, shot him" and "such an inference stretches the definition of "reasonable" beyond its natural boundary." The undisputed facts permitted the officers to use deadly force.

[63] Adams v. Metiva, 31 F.3d 375 (6th Cir. 1994).
[64] Burchett v. Kiefer, 310 F.3d 937 (6th Cir. 2002).

The decision to award the officers with qualified immunity was affirmed.

INTERROGATION – RIGHT TO SILENCE

Rogers v. Kerns, 2012 WL 2126355 (6th Cir. 2012)

FACTS: Following his arrest for an Ohio murder, Rogers was interrogated. He provided an inculpatory statement given during a custodial interrogation. During a suppression hearing, one of the officers testified that he wanted to talk to his father and that "my dad would want me to have a lawyer here." There was another mentioned, when he was asked to write out his confession, in which he said "I can't write this with a lawyer or anybody."

Rogers was convicted, and appealed.

ISSUE: Must a subject be specific about asking for an attorney to invoke the Edwards rule?

HOLDING: Yes

DISCUSSION: The Court noted that, under Edwards, it was improper to continue to question Rogers after he invoked his right to counsel.[65] However, the Court agreed that he never, in fact, did that. Looking to Davis v. U.S., it concluded that what he said was not a ""formal, unequivocal request for an attorney such that it mandated the cessation of all further interrogation," as "[s]tatements less ambiguous than [Rogers's] have been found to be too ambiguous to require that questioning cease."[66] The Court did not agree that his request to speak to his father should have been construed as a request to a lawyer, as he was 19 years old, not a juvenile. To do so would have forced the officers in the "type of guessing game rejected by Davis…."

The Court upheld the denial of the habeas plea.

INTERROGATION – SELF- INCRIMINATION CLAUSE

U.S. v. Vreeland, 684 F.3d 653 (6th Cir. 2012)

FACTS: While on probation for an unrelated matter, in early, 2008, Vreeland committed a home invasion and theft in Kalamazoo, Michigan. Officer Bobo, his U.S. Probation Officer learned of the crime. When Vreeland reported, as scheduled, he told Bobo about an interview with the investigator in that crime. He denied any involvement and denied current ownership of the vehicle (registered to him) supposedly involved – he claimed to have sold it to a junkyard. Bobo asked for documentation as to that, but did not receive it. Vreeland was arrested for a violation of his supervised release, but

[65] Edwards v. Arizona, supra.
[66] Davis v. U.S , supra.

refused a waiver of a hearing. Later that year, Bobo was advised that he was no longer expected to be prosecuted. However, Bobo continued his own investigation and met with Vreeland (who was apparently soon to be released again) to review his supervision conditions. By October, Bobo had concluded that Vreeland had, in fact, committed the crime and brought it up in a scheduled meeting, asking his "specific questions" about the crime. He denied knowing Russell, the other person involved, and Bob warned him that it was a violation of federal law to lie to a federal officer. He made a written statement denying any knowledge of Russell. Vreeland then left.

Eventually, Vreeland was charged with lying to Bobo. Bobo also sought revocation, claiming that Vreeland did commit the crime in violation of his conditions. The Court agreed and revoked his probation. Vreeland appealed.

ISSUE: Does questioning while not in custody trigger the Fifth Amendment?

HOLDING: No

DISCUSSION: Vreeland argued that when he was questioned by Bobo, his Fifth Amendment right against self-incrimination was violated. The trial court agreed that Vreeland was not in custody, therefore Miranda wasn't required. Further, Bobo had been informed that Bobo's attorney had resigned at the time of his visit. Vreeland argued, however, that under Minnesota v. Murphy,[67] the "threat to impose sanctions or penalties such that it forces self- incrimination" automatically invoked the Fifth Amendment. However, in that case, the Court held that simply meeting with a probation officer does not invoke self-incrimination and that Bobo did not threaten arrest or a violation during the initial meeting. In fact, he was permitted to leave. He was advised of the penalty for lying and "lie he did."

The Court upheld his conviction.

INTERROGATION - MIRANDA

U.S. v. Shields, 2012 WL 1654956 (6th Cir. 2012)

FACTS: On May 19, 2004, Shannon and Sonny Shields (cousins) carjacked and abducted Lott, in Memphis. Ultimately, Lott was murdered. The crime was caught on surveillance camera, and there was one eyewitness, Tapplin, age 13. He identified Sonny Shields in a photo array shortly after the crime, but failed to do so several days later. Tapplin was never able to identify Shannon.

Sonny turned himself in, making inculpatory statements, but "largely shifted the blame" to Shannon. Shannon was apprehended in Mississippi and turned over to Memphis officers. He waived Miranda and gave a "self-serving but incriminating" statement, shifting the blame primarily to Sonny. During the ensuing trial, Trooper Arnold

[67] 465 U.S. 420 (1984).

(Arkansas State Police) testified about similarities between Shannon's shoes and shoe prints near the body.

Shannon was convicted, and appealed.

ISSUE: Does mental incapacity invalidity a Miranda waiver?

HOLDING: Not automatically

DISCUSSION: Shannon argued that his waiver was not made knowingly or intelligently because he is, in fact mentally retarded. The Court agreed that diminished mental capacity can limit the ability of a subject to understand their rights, but the defense was not raised as it should have been. Further, borderline intelligence does not necessarily mean that the subject cannot validly waive Miranda, but simply, it must be decided on a case by case situation. In this situation, the trial court had noted that he manifested no outward sign of being unable to comprehend his rights and validly waive them.

Further, the Court agreed that Trooper Arnold was not an expert but that it was proper lay testimony based upon his rational perceptions under FRE 701.

Shannon Shields' conviction was upheld.

INTERROGATION – CUSTODY

Mason v. Brunsman, 2012 WL 1913965 (6th Cir. 2012)

FACTS: Mason and (Angela) Turley were involved in an on-off romantic relationship for about two years. Turley moved from Mason's home, in Northern Kentucky, to her mother's home in Ohio, and got a DVO against Mason, in 2003. Two months later, she claimed he violated the order and asked for a hearing.

On May 13, 2003, the day before the scheduled hearing, Turley's mother, Janie, found Mason in her apartment parking lot. He claimed to have money he owed Angela. He followed Janie and forced his way into the apartment, holding a gun. He and Angela (who was inside) struggled over the gun and Angela was shot. Janie tried to intervene but was struck in the head. She witnessed Mason shoot Angela twice in the head, killing her.

Mason fled to Kentucky, where he was located in Covington. While at the ER, awaiting treatment (he'd shot himself in the hand), Det. Webster (Covington PD) held him in a room. He told Mason that Ohio officers were on the way and would likely question him at the Covington PD. Mason began a story that was "markedly different" from that given by Janie Turley. Webster stopped him and asked him if he knew his rights, and Mason responded with most of the rights, missing only the right to have an attorney appointed. Webster reminded him of that right and continued the story, claiming,

essentially, that Angela had the gun. As Mason was being questioned, he was receiving treatment for his injury and was transferred to another hospital for surgery. He gave another statement, identical and was eventually arrested and taken to jail.

Mason was indicted in Ohio and eventually convicted of murder. When he was unsuccessful in state court appeals, he took a habeas petition, which was denied. He then appealed that denial.

ISSUE: Is being held in a hospital under guard custody?

HOLDING: Yes

DISCUSSION: The Court noted that the Ohio court had "ignored the fact that Mason was placed in a small room with constant police supervision and was not allowed to walk anywhere, including when he was taken for an x-ray, without at least one officer accompanying him." It continued that any setting "can be transported into a custodial environment."[68] Even though medical personnel were freely permitted in the room, Mason was under continual supervision by armed officers. He was never told he could leave or that he could stop answering questions, but was told instead, he was under investigation and that his next stop was the police station. A reasonable person would not have felt free to leave. However, the admission of his self-serving statement did not have a material effect on the verdict, in the fact of Janie Turley's testimony.

The Court affirmed the denial of the writ.

SUSPECT IDENTIFICATION

U.S. v. Washam, 468 Fed.Appx. 568, 2012 WL 1109465 (6th Cir. 2012)

FACTS: On March 26, 2003, a Bowling Green (KY) bank was robbed. 29 days later, it was robbed by someone, again, who fit the same description. An employee saw the robber's car, however, during that robbery. Several weeks later, Washam robbed a bank in Florence and he was apprehended within minutes. Because Washam matched the description of the Bowling Green robber, a photo array was shown to witnesses, three identified him. The FBI also learned that Washam had sold a car matching the description of the vehicle seen during the Bowling Green robbery, just days after that robbery.

Washam moved to suppress the identifications, arguing that they photo array was too suggestive. The trial court agreed that "Washam's picture was the only one that matched the suspect's description." However, the Court ruled that the identification was reliable, after reviewing it with the factors in Neil v. Biggers.[69]

[68] Orozco v. Texas, 394 U.S. 324 (1969).

[69] 409 U.S. 188 (1972). Whether an identification is reliable turns on (1) the witness's opportunity to view the criminal, (2) his degree of attention, (3) the accuracy of his prior descriptions, (4) how certain he was when he made the identification and (5) the length of time between the crime and the identification.

Washam was charged and convicted of bank robbery and related offenses.

ISSUE: Is a failure to identify a suspect at trial (after having identified them previously) necessarily fatal?

HOLDING: No

DISCUSSION: The Court agreed that the identifications were reliable, despite concerns that only one witness could identify him at trial. Three years had passed and Washam had significantly changed his appearance in the meantime. The Court upheld the admission of the identifications.

In addition, Washam argued that admitting evidence of the Florence robbery, to which he pled guilty, violated FRE 404(b). The Court agreed, however, that it provided motive (admitted drug addiction) and helped to show identity since a person with a similar description committed the robberies. In addition, there were other similarities, such as the demeanor of the robber. The Court agreed its admission was proper.

Washam's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – BRADY

Thorne v. Timmerman-Cooper., 473 Fed.Appx. 457, 2012 WL 1130420 (6th Cir. 2012)

FACTS: On March 31, 1999, Layne was murdered in her home. During the investigation, it was discovered that Layne was pursuing a paternity action against Thorne, with respect to their son, Brandon. Wilkes became a suspect after another witness contacted the police concerning his statements that he'd been hired to kill a woman. Wilkes was arrested and implicated Thorne, leading police to the murder weapon (a knife) and his clothing.

Thorne was convicted for his involvement and appealed. He exhausted his state court claims and took a habeas corpus petition.

ISSUE: If information is not exculpatory, must it be disclosed under Brady?

HOLDING: No

DISCUSSION: During lengthy post-trial actions, Thorne argued a Brady claim that, among other things, police had shown two witnesses who saw a man at the crime scene a photo array including both him and Wilkes, and that the witnesses could not identify him. The trial court concluded that the failure to disclose this information was "neither exculpatory nor material" as any number of other people could have been at the home. With respect to evidence that suggested that the investigation was not thorough

or reliable, again, the Court found that Brady was not violated. Finally, any evidence that he was "framed" by the police was also not required to be produced.

The Court agreed that although there was no doubt that the prosecution withheld evidence, that there was not proof that the evidence was "both exculpatory and material."

Thorne's habeas petition was denied.

TRIAL PROCEDURE / EVIDENCE – ENTRAPMENT

U.S. v. Lemons, 2012 WL 1662035 (6th Cir. 2012)

FACTS: Lemons, a convicted felon, bought a rifle from a friend, Capps. Capps happened to be a jailer, and then a deputy sheriff. He assured Lemons it was legal for him to own a long gun. Lemons was discovered with the rifle and was indicted in federal court. He pled guilty. When it was learned that he was to be sentenced, however, as an armed career criminal, he argued for entrapment and a lesser sentence because of what he'd been told. The judge was sympathetic but sentenced him accordingly. Lemons appealed.

ISSUE: Is estoppel by entrapment available when a state or federal officer tells a subject that an action is legal?

HOLDING: No

DISCUSSION: The Court noted that in the Sixth Circuit the defense of "estoppel by entrapment" is not available "when a state or local law enforcement official tells a defendant that an act is legal, and the federal government prosecutes the crime."[70] Lemons argued for a partial use of the doctrine as a "middle ground." The Court, however, declined to do so and upheld his sentence.

U.S. v. Hackworth, 2012 WL 208694 (6th Cir. 2012)

FACTS: On February 18, 2009, Hackworth (age 31) began chatting with "Amber" via the Internet. He believed he was chatting with a 14-year-old girl, but in fact, was chatting with Det. Arterburn (Louisville Metro PD). He friended her on the Yahoo site they were using. On April 7, "Amber" initiated a chat by commenting on Hackworth's avatar. At his request, a photo was provided that was a young-looking female officer. Hackworth commented that it was "too bad" that she was only 14 as they could "have some fun if she was older." The conversation continued with "Amber" prodding him to explain what might happen at a meeting. He assured her they would just meet. The next day, he initiated contact and they again discussed a meeting to "hang out." However, although it became sexual in nature, he said he would never meet with her as

[70] U.S. v. Ormsby, 252 F.3d 844 (6th Cir. 2001).

she was too young. The next day, Hackworth again initiated a conversation as to wishing she "did massages" that he would be willing to pay for. Finally, the following day, he discussed having sex and agreed to meeting. When Hackworth approached the decoy "Amber," he was arrested.

Hackworth was charged under 18 U.S.C. §2422(b).[71] At trial, Det. Arterburn testified as to what the crime would have been had they had sex. Hackworth was convicted and appealed.

ISSUE: Does continuing a communication with an apparent minor negate an entrapment defense?

HOLDING: Yes

DISCUSSION: Hackworth argued that he was entrapped by the communications. Under federal law, such a defense "requires proof of two elements: (1) government inducement of the crime and (2) a lack of predisposition on the part of the defendant to engage in the criminal conduct." The prosecution bears the burden to show predisposition beyond a reasonable doubt. The government conceded that Hackworth did not have a prior record of soliciting children for sex nor did a subsequent search reveal any indication he was interested in such. However, the Court noted that he asked her for "sexy" photos and continued contacting her after he knew her age. Although looking at certain passages of the chat log, in isolation, may have supported his contention that he only wanted to meet and talk with her, taken in its entirety, and his explicit responses to her prompting, meant otherwise.

Further, under the federal statue, the fact that he was, in fact, chatting with an adult did not negate his conviction, as the law criminalized only the attempt to persuade a minor to engage in unlawful sex. The fact that the underlying Kentucky sexual offenses would have required a minor for conviction was immaterial.

The Court upheld his conviction.

U.S. v. Helton, 2012 WL 1861031 (6th Cir. 2012)

FACTS: In July 2008, Helton began exchanging emails with who he thought was a 14-year-old girl in Tennessee. In fact, he was communicating with an officer. In their initial communications, when "Hannah" revealed her age, he told her he was only interested in "legal fun." However, they continued to communicate and finally set up a meeting. He was arrested. He later stated he thought he was communicating with an adult role-playing as a child. He argued for entrapment but was convicted. Helton appealed.

ISSUE: Does the government placing an ad to entice a potential child molester constitute entrapment?

[71] Coercion and enticement to engage in prostitution.

HOLDING: No

DISCUSSION: The Court reviewed the law on entrapment, which required that the government induce the crime and a showing that the defendant was not predisposed to commit the crime.[72] Entrapment is an issue for the defense to raise and prove and is usually a jury issue. The Court looked to the character or reputation of the defendant, their prior criminal record, whether the suggestion originated with the government, whether there was a profit motive, whether the government repeatedly tried to induce the defendant and the nature of the inducement or persuasion. In this case, Helton responded to the ad placed that was intended to trigger a response and he first suggested criminal contact. (The Court noted that others that responded to the ad, when they discovered Hannah was 14, notified the website and/or law enforcement.) The Court agreed that the Government did not entrap Helton.

Helton's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – CONSTRUCTIVE POSSESSION

U.S. v. Williamson, 2012 WL 1940340 (6th Cir. 2012)

FACTS: On August 6, 2008, Memphis officer saw Williamson engage in a drug transaction with another man. When they approached, Williamson fled, ducking into an apartment a few feet away. Det. Handley saw that Williamson was holding something in one hand and "clutching his right hand." Williams threw down marijuana while fleeing up interior stairs, and at the top of the steps, took a "black object" from his waistband and tossed it, making a loud sound. He was apprehended in a bathroom. A loaded black handgun was located in the area where he'd tossed the object.

As a convicted felon, Williams was arrested for its possession. During discovery, the government provided a copy of the arrest documents which reflected oral statements he made, along with the rights waiver form. However, on the back of the form, which was not provided, he also denied possessing the gun and denied any knowledge of it. At trial, his sister, who lived in that apartment, testified that the weapon belonged to someone else and contested where the pistol was located. She admitted she had not told anyone that the pistol belonged to someone else (a former boyfriend who had belongings there) until a moth before the trial and the claimed owner was deceased.

When the actual rights waiver was produced to rebut an unrelated claim, an objection was made because only the front side had been provided. The document itself was not admitted.

Williams was convicted and appealed.

[72] U.S. v. Khalil, 279 F.3d 358 (6th Cir. 2002).

ISSUE: May evidence as to how a weapon is situated be introduced to prove a subject could have been in possession of it?

HOLDING: Yes

DISCUSSION: Williamson argued that the evidence was not enough to prove he possessed the weapon. He claimed it was unlikely, if not impossible, for him to have thrown the weapon where it was found. However the Court agreed that the jury had the advantage of photos and an officer's testimony, and that their decision was rational. On a related note, the Court agreed that the officer that testified about the gun was correctly permitted to testify about whether it was possible to toss the pistol from the steps in to the open closet, as his rational perception. The testimony was proper as lay testimony.

With respect to the rights form, the back of which was introduced to rebut a suggestion that Williamson was abused during his arrest, the Court found it was proper to admit it. By the time it was introduced, his counsel was aware of the document. Further, his counsel was aware that the document was two-sided and that they had an opportunity to review the original, but chose not to do so. He had always argued he did not possess the pistol, so his statement to that effect was not material.

Williamson's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - GIGLIO

U.S. v. Hill, 2012 WL 2016396 (6th Cir. 2012)

FACTS: In January, 2009, Hill encountered "Amber" in a chat room. In fact, Amber was Det. Arterburn (Louisville PD). After chatting online for some time, Hill solicited Amber for sex and drove to Kentucky to meet with her. He was arrested and found in possession of numerous child pornography images.

After Hill's arrest, however, the detective was accused of misusing government resources to harass his ex-wife. He was indicted. This information was not provided to Hill, who was ultimately convicted. He argued for a new trial, arguing that he should have been provided the information under Giglio v. U.S.[73] and FRE 33.

ISSUE: Is undisclosed information about alleged officer misconduct always relevant under Giglio?

HOLDING: No

DISCUSSION: To be entitled to a new trial, the Court agreed that Hill must demonstrate that the undisclosed evidence would have been so material that it would have changed the outcome of the trial. In this case, the Court found no reason for

[73] 405 U.S. 150 (1972).

Arterburn to lie about Hill. He had been able to cross-examine Arterburn about other instances in which his credibility was questioned, to no avail. The overwhelming evidence against Hill was not affected by Arterburn's situation.

NOTE: *Det. Arterburn was cleared of all charges for which he was indicted in June, 2012.*

U.S. v. Taylor, Henderson and Lewis, 471 Fed.Appx. 499, 2012 WL 2366243 (6th Circ. 2012)

FACTS: During an extensive drug-trafficking investigation in the Cleveland area, officers suspected Henderson of being involved in transporting PCP from California to Ohio. The found Henderson registered at a hotel in Brooklyn (OH) even though he lived nearby in Cleveland. They learned he'd stayed there often and that he had an active felony warrant. On January 11, 2007, they learned he'd returned to the hotel. The officers also found that Lewis, who was supposedly from California, was staying in the next room, along with a second man. They set up surveillance of both rooms. Ultimately, they followed two minivans that were linked to the three men, a green minivan currently occupied by Henderson and Madden, and silver one by Lewis and Taylor. A uniformed officer was asked to make the stop.

Upon stopping the vehicle, the officers smelled marijuana. Henderson gave a false ID and was not fully identified by Madden, either. Officers, however, recognized him to be Henderson. Both were arrested. Madden was found to be in the possession of a large amount of cash, but no drugs. Madden (Henderson's wife) finally gave consent to search their home and admitted they would find cash and marijuana. In fact, they found PCP and other contraband, as well. Madden was arrested.

Henderson was given Miranda and ultimately claimed responsibility for what was found at the house. When the vehicle parked, the officers pulled alongside and realized that the occupants were smoking marijuana. They learned additional information and sought a warrant for the room occupied by Lewis and Taylor. There, they were confronted with the "the "overwhelming" chemical odor of PCP and they discovered an open water bottle containing PCP in the sink." They found a vast amount of PCP and cash, along with plane ticket, in the room. They did not seize luggage at that time, but was later given the luggage by the hotel, and it was found to contain clothing that corresponded to Lewis and Taylor's sizes.

Everyone was arrested and indicted on drug trafficking charges. They moved for suppression, based upon the argument that Madden's consent and the statements she made incriminating Henderson was coerced by her detention. The trial court agreed that she had been "for all intents and purposes, been illegally arrested when she was put into the back of Captain Heffernan's car." All evidence against Madden was suppressed and the charges were dismissed. Henderson appealed as well, and because of the privacy interests he held in the home, the Court agreed that all such evidence found there against him would also be suppressed as "fruits of the poisonous

tree." However, the Court agreed that it was proper to admit his statements as they were unrelated to the search of the house.

Lewis and Taylor moved to suppress the evidence found in their room, arguing a lack of probable cause.

After a complicated criminal proceeding, all were convicted. Following the trial, it was discovered that one of the agents involved, Lucas, had "previously made knowingly false statements under oath in other cases," and they were not notified. (He was apparently under investigation at the time.) All appealed on numerous issues.

ISSUE: Is non-material evidence required to be disclosed under Giglio?

HOLDING: No

DISCUSSION: First, With respect to Agent Lucas, the Court noted that the evidence against Agent Lucas "was not material to the suppression-hearing proceedings or to the trials held in this case." Further, following the trial, some of the allegations made against Lucas were not sustained. In addition, his testimony was corroborated by others or by independent objective evidence. The Court did not approve of the effort to protect the agent, but did not find it affected the final determination.

Next, Henderson argued that his statements about connections to Lewis and Taylor were fabricated by Agent Lucas. Then asserted, in contradiction, that any statements made were intended to protect Madden. The Court concluded the statements were properly admitted. Lewis and Taylor agued their statements should have been suppressed because they lacked reasonable suspicion to stop the van, probable cause to arrest them or probable cause to search the room. The Court noted that the trial court had found probable cause existed for the stop based upon traffic offenses and as such, the stop was lawful. Both that, and the spotting of them apparently smoking marijuana, justified the stop. They apparently admitted to smoking marijuana and as such, they were properly arrested.

With respect to the affidavit, the Court agreed that it was sufficiently detailed.

Taylor argued that he did not "knowingly possess" the PCP found in the room. Taylor was not listed as a guest, but the government proved that he was staying there, by finding clothing and a plane ticket. He was an occupant of the room during the relevant time frame, and the PCP was in plain view, and plain smell. Intention to distribute could be inferred by the quantity.

All of the convictions were affirmed.

CHILD PORNOGRAPHY

U.S. v. LaPradd, 2012 WL 1662439 (6th Cir. 2012)

FACTS: In the summer of 2009, LaPradd was using public computers at UL to look at images of nude minors. It was reported to the librarian, who then reported it to ULPD. He returned the next day and officers went to investigate. They watched through a window and saw he was looking at "what appeared to be images of nude children." He accompanied the officers outside and was given Miranda. One officer remained at the terminal to investigate what he'd been looking at. He agreed he had been looking at the images and that he had a flash drive with images, but argued that "some photographers would argue that it's not child pornography." (Later, when testifying, the officer who examined the images could not recall if the images "depicted children engaged in sexual acts."

LaPradd was arrested for violating KRS 531.335. They seized the computer and flash drive. He waived his Miranda rights and stated he was researching the nude photography of children, and admitted he had more images at his apartment. He consented to a search of his apartment. Det. Jewell did a search warrant to do a forensic evaluation of the computers. Many images were found.

As a result, LaPradd was indicted for "knowingly possessing and receiving child pornography." He moved for suppression, which was denied. He appealed.

ISSUE: May admissions to the possession of child pornography substitute for actual proof that photos are pornographic?

HOLDING: Yes

DISCUSSION: LaPradd argued that the prosecution did not prove that the images were, in fact, child pornography and as such, the officers lacked probable cause to arrest him. The Court, however, noted that he had, in fact, admitted he had child pornography and as such, his "voluntary, self-incriminating statement established probable cause" for the arrest. The officers "were not obligated to investigate further to determine whether the images on the computer screen did in fact constitution child pornography."

The Court agreed that the arrest was proper. Further, the Court agreed that his post-arrest statements were given after he was given Miranda and as such, admissible.

U.S. v. Mauck, 469 Fed.Appx. 424, 2012 WL 1253209 (6th Cir. 2012)

FACTS: Memphis FBI agents (Crimes Against Children Task Force) received complaints about sexually explicit images of children on Mbuzzy, a social networking site. They created undercover personas to contract suspects (including Mauck) and exchanged numerous messages with such photos. They discovered his identity and

address and learned he had a prior conviction for possessing child pornography. They arrested him and searched his motel room.

Mauck eventually pled guilty, but objected to a sentence enhancement.

ISSUE: Is barter (of images) a thing of value?

HOLDING: Yes

DISCUSION: Mauck argued that his expectation that he would get different images in exchange was not a "thing of value" that warranted the higher sentence. The Court agreed, however, that since he expected to get pictures in return, the enhancement was proper.

Mauck's sentence was upheld.

EMPLOYMENT – FIRST AMENDMENT

Whitney v. City of Milan (TN), 677 F.3d 292 (6th Cir. 2012).

FACTS: Whitney was employed by the City of Milan and eventually was moved to a position working under the City Recorder, Williams. (They were, in fact, close personal friends.) Williams was fired. Crider ordered Whitney to have no contact with Williams. Whitney was concerned if she did so, she would lose her job. Williams filed a lawsuit against the City, alleging gender discrimination and for speaking out against public corruption. Whitney subsequently filed suit as well, arguing that the City violated her First Amendment rights, specifically her "prior restraint" claim. Crider moved for summary judgment and was denied. He filed an interlocutory appeal.

ISSUE: Is it proper for an employer to order an employee to have no contact with a former employee (absent a complaint)?

HOLDING: No

DISCUSSON: The Court only addressed the issue of Crider's order not to promote Williams's allegations and his order to not participate in the lawsuit. The Court agreed that the order did "restrict private-citizen speech on a matter of public concern." Applying the Pickering[74] "balancing test," Crider argued that the restriction was an appropriate way to prevent "the workplace disruption that occurs when a current employee fraternizes with a former, disgruntled employee." The Court noted that he subjected Whitney "to an indefinite gag order without any showing that Whitney had previously caused disruptions in the workplace."

[74] Pickering v. Board of Education, 391 U.S. 563 (1968).

The Court agreed that Crider's prohibited speech was of "significant interest to the public" and it had "consistently protected a public employee's right to discuss issues of public corruption and workplace discrimination," which are automatically of public interest.

The Court agreed the Crider was not entitled to qualified immunity.

EMPLOYMENT – DISCRIMINATION

Toth v. City of Toledo, 2012 WL 1816160 (6th Cir. 2012)

FACTS: Toth had worked as a Toledo police officer since 2000. He was involved in several incidents in which he allegedly destroyed evidence and abused his authority, for which he was suspended and was given a deferred termination.[75] In 2006 he took the sergeant's test and did well, scoring 8 out of the 48 who took the test. The promotion process, however, had discretionary elements, and Toth, a white male, was never promoted. Over the ensuing years, a total of 17 officers were promoted, 14 white and 3 African-American. Toth sued, claiming reverse racial discrimination. The District Court gave summary judgment to the City and Toth appealed.

ISSUE: Must a comparison be made between similarly-situated subjects for a discrimination claim?

HOLDING: Yes

DISCUSSION: The Court reviewed the issue under the Equal Protection Clause, as Toth claimed "he was deprived of his Fourteenth Amendment right to equal protection under the law when defendants disciplined him and later did not promote him to sergeant, both times because of his race." The Court found no background evidence that the city regularly discriminated against the majority race "with respect to punishment." As he could not demonstrate he was punished more severely than "similarly situated minority officers." Situations he described did not prove his point. North could he demonstrate discrimination with respect to promotions, and no officer with a similar disciplinary record was promoted.

The summary judgment was upheld.

FIRST AMENDMENT

McGlone v. Bell, 681 F.3d 718 (6th Cir. 2012)

FACTS: McGlone, an evangelical Christian, sought to speak on the campus of Tennessee Technological University (TTU). The campus "blends in" with Cookeville and there are only a few signs marking the campus boundaries. City streets run

[75] In effect, he was terminated, but his termination was suspended for three years.

through the campus, which includes "many open, accessible areas on the grounds, including sidewalks, park areas with benches and tables, pedestrian malls, and other public ways." McGlone contacted TTU on April 6, 2009, to find out what he needed to do to speak on the campus and was directed to "stop by the office when he wanted to speak." The next day, he and a friend, Holes, came to the campus, but before they arrived at the designated office, they spoke to a few students. McGlone went to the office and was told he could speak at a particular location, but he asked if he could use a different location, "there being more students and tables and chairs in that area." He was told the first location was his only option. He asked to see the written policy on the issue and was threatened with arrest. They continued to pursue the matter with the Dean of Student Affairs. While awaiting a decision, they returned to their preferred location and began to speak to students. TTU Officer Lambert arrived and told them if they did not leave, they would be charged with trespass. They both left.

The next day, McGlone contacted the Dean and asked what he needed to do to speak on campus. He was told policy required a written application, submitted 14 days in advance, since he was not affiliated with the campus. McGlone sought further discussion with the Dean and was denied. They went to a location they believed to not be on the campus, as it appeared to be a city sidewalk. They were again threatened with arrest.

McGlone filed suit under 42 U.S.C. §1983, asserting a policy that has a First Amendment chilling effect. The policy allows university officials open-ended discretion as to where a speaker can be permitted to be, and he argued that the location he was instructed to use was a location "where no one ever goes." The U.S. District Court dismissed the lawsuit, finding McGlone lacked standing and further, that the "that the campus use policy is content-neutral, narrowly tailored to serve significant government interests, and left ample alternative channels for communication." McGlone appealed.

ISSUE: Are public areas in a university campus public fora?

HOLDING: Yes

DISCUSSION: First, the Court found that he did, in fact, have proper standing to bring the case. Further, a chilling effect is a "present injury," and he properly presented evidence that the policy prevented him from exercising a constitutional right. The Court did not agree that his failure to actually apply for a permit destroyed his standing. He was threatened with arrest twice, he sought a waiver of the permit and was denied.

With respect to the actual claim, the Court analyzed the proposed forum. Using a three-step process to determine: 1) whether the expressive activity deserves protection; 2) the nature of the forum, and 3) whether the justifications for exclusion from the relevant forum satisfy the requisite standard.[76] The Court agreed that his speech clearly deserves protection. Further, the Court agreed that the perimeter sidewalks are

[76] Parks v. City of Columbus, 395 F.3d 643 (6th Cir. 1985); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1995). Saieg v. City of Dearborn, 641 F.3d 727 (6th Cir. 2011).

"traditional public fora" and that "all other open areas are designated public fora." The sidewalks, in particular, blend in with the city's sidewalks. The other open areas have been designated by TTU as places where speaking might occur, and as such, those areas are public fora. Finally, the policy imposes a prior restraint which is presumptively unconstitutional. "A prior restraint must be content-neutral, narrowly tailored to serve a significant governmental interest, and leave open alternatives for communication." The policy in question is not narrowly tailored and unreasonably burdensome. "Any notice period is a substantial inhibition on speech."[77] "The simple knowledge that one must inform the government of his desire to speak and must fill out appropriate forms and comply with the applicable regulations discourages citizens from speaking freely."[78] Finally, the Court agreed that "registration requirements dissuade potential speakers by prohibiting anonymous speech." [79] The Court found that TTU could not adequately defend their policy.

Finally, the court reversed the decision to give TTU officials qualified immunity, noting that the issues in this case had been clearly established prior to the situation.

[77] Dearborn, supra.
[78] N.A.A.C.P. v. City of Richmond, 743 F.3d 1346 (9th Cir. 1984).
[79] Watchtower Bible McIntyre v.Ohio Elections Comm'n, 514 U.S. 334 (1995); see also Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999); Talley v. California, 362 U.S. 60 (1960).